IN THE SUPREME COURT OF MISSOURI

No. SC 87559

RANDALL D. PETERS, Individually and as Next Friend for Constance Marie Peters,
Respondent,

v.

GENERAL MOTORS CORPORATION,
Appellant.

Appeal From the Circuit Court of Jackson County
Honorable Marco A. Roldan, Judge

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JURISDICTIONAL STATEMENT

This is an appeal of a judgment of the Circuit Court of Jackson County in favor of Plaintiffs Connie and Randall Peters against Defendant General Motors Corporation ("GM"), on Plaintiffs' claims of strict liability product defect, strict liability failure to warn, and negligence. (LF 2746-50) Judgment on a jury verdict was entered on January 7, 2003, in the amounts of $30 million in compensatory damages, $50 million in punitive damages, and approximately $2 million in prejudgment interest. (LF 2749-50)

GM timely filed motions for judgment notwithstanding the verdict, for new trial, or for remittitur, and to amend the judgment, on February 6, 2003. (LF 2751-2800) The trial court denied GM's post trial motions by operation of Supreme Court Rule 78.06. (LF 3193) On May 16, 2003, GM timely filed its notice of appeal. (LF 3188)

On January 17, 2006, the Missouri Court of Appeal, Western District, sitting en banc, reversed the judgment and remanded for a new trial on liability. The Court reversed the punitive award outright.

Plaintiffs moved for rehearing or transfer to this Court. The court of appeals denied the motion. This Court granted transfer pursuant to Rule 83.04 and reviews the case as if on original appeal. Mo. Const. art. V, § 10; Mo. Sup. Ct. R. 83.09.

STATEMENT OF FACTS

Except as noted, the facts are based on Plaintiffs' evidence or are undisputed.

I. The Accident

On September 6, 2001, Connie Peters left the house just before 7:00 a.m. to go to work. (T 318 [Payne], 826 [Peters])[1] As she was leaving the driveway in her 1993 Oldsmobile Cutlass, the car "took off," "accelerating" backward at up to 22-25 mph. (T 423, 428, 496, 503 [Wall.], 1273-74 [Moff.]) The car traveled 118 feet down the driveway, across the street, and up a slope into a neighbor's yard. (T 405, 415 [Wall.], 1245-46, 1309 [Moff.]) There, it sideswiped a tree, knocking Mrs. Peters unconscious. (T 415, 457-58 [Wall.], 1291-92, 1309 [Moff.])

The car "spun" off the tree and continued another 95 feet in reverse, down the neighbor's slope, back across the street, and up a slope into the Peters' yard. (T 409, 416 [Wall.], 1246 [Moff.]; PEX 166) The car came to rest "high-centered" with its front frame resting on landscape timbers and its left front tire "in the mulch" inside the timbers, where Mr. Peters found it with the engine "idling." (T 433, 436, 529 [Wall.], 830, 845-46 [Peters]; PEX 121, 130) Mrs. Peters suffered severe injuries to her head and left arm,

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[1] Testimony in the trial transcript is cited as "T __ [Witness]". Deposition testimony read at trial (but not re-transcribed) is cited as "PEX __, p. __ [Witness]". A description of the witnesses and abbreviations for their names is attached as Exhibit A. The Legal File is cited as "LF __". Plaintiffs' and GM's trial exhibits are cited as "PEX __" and "DEX __," and listed at LF 2707 and LF 2694, respectively.

nd remained in a persistent vegetative state through trial. (T 578-79 [Wink.]; PEX 147 pp. 7-8 [Webb]) She passed away on March 3, 2004.

The Peters sued GM, which made the Oldsmobile (referred to as a GM 'W' car). (T 822 [Peters], 921 [Craw.]) The car had been driven some 76,000 miles and required only routine maintenance during the eight or more years Plaintiffs owned it. (T 496-97 [Wall.], 823 [Peters]; PEX 586 p. 133 [Sero])

II. Plaintiffs' Expert, His Defect Theory, And The Evidence

Plaintiffs claimed a defect in the Oldsmobile's cruise control system caused Mrs. Peters' sudden acceleration. Their expert, Samuel Sero, opined that a "transient voltage spike" from the vehicle speed sensor entered the cruise control, which was turned off at the time of the accident; bypassed several protective devices designed to stop it; and simultaneously actuated the cruise control's "vent" and "vac" valves, thus opening the car's throttle. Plaintiffs' case rested on Sero's transient signal opinion: "Sam Sero told you things that were very important about this cruise system"; "he actually pointed to it and said, here's the problem. It's the design." (T 1504, 1460 [closing])

Sero agreed no physical evidence exists that his hypothesized transient activated the cruise control, that his own testing could not validate (really, disproved) his theory, that no such event has ever been shown to have occurred in the real world, and that the federal agency responsible for vehicle safety found it "extremely remote" that it ever could. Nevertheless, he opined that GM should be held liable, in strict liability and negligence, for designing and selling the car with his supposed "defect." (PEX 586 pp. 158-62, 174 [Sero]) Plaintiffs argued GM should be punished for it.

A. The 3-Mode Cruise Control System

The Oldsmobile's "3-mode" cruise control system was the type "generally used in the automobile industry" from 1983-93. (T 937 [Craw.]; PEX 586 p. 21 [Sero]) Roughly 100 million cars used it. (PEX 586 p. 129 [Sero]) It is "vacuum-based," using electronically-controlled valves to regulate a vacuum in a rubber diaphragm, or "servo," to open or release the throttle. (PEX 586 pp. 21-25 [Sero])

The cruise control's "brain" is the integrated circuit board ("IC"), which controls the servo. (PEX 586 pp. 24-25 [Sero]; T 947, 954 [Craw.]) When the cruise control is switched on and activated, an electrical signal is sent from the "wand" on or near the steering wheel to the IC, which distributes the signal to "drivers" that activate the vacuum ("vac") valve in the servo. (PEX 586 pp. 24-25 [Sero]; T 964 [Craw.]) The vac valve, by "suck[ing] the air out," creates a vacuum, which pulls a cable and opens the throttle. (PEX 586 p. 22 [Sero]) Pressing the brake "get[s] rid of the vacuum" by allowing air back through the "vent valve," releasing the throttle. (PEX 586 pp. 23-24 [Sero]) The vent valve is "four times larger" than the vac valve, so it lets air in (deactivating the cruise) several times faster than the vac valve sucks air out (activating the cruise). (T 966-68, 973-75 [Craw.]; PEX 579, p. 018197)

The 3-mode cruise control has several features to prevent the throttle from being inadvertently activated by a vehicle malfunction (like a transient signal):

- A driver-activated "on/off switch" "does not allow any power to be fed to the cruise module" to open the throttle unless the switch is "in the on position." (T 960-61, 1014-15 [Craw.]; PEX 586 pp. 138-39 [Sero])

- A "low speed inhibitor" will not allow the cruise control to activate unless the car reaches at least 25 mph. (T 969 [Craw.])
- Two different mechanisms shut off the cruise control when the brake is pressed: (1) The "brake switch" sends an electrical signal to the cruise control module "to drop out of cruise and . . . removes power from the [vent and vac] valve drivers" on the IC. It is activated by pressing the brake "a quarter to a half an inch." (2) The "dump valve" releases vacuum from the servo, and is activated by pressing the brake "half an inch to an inch," enough force to turn on the brake light. Even if the brake switch "had a fault," the dump valve would "open a big hole to the servo" to release the vacuum and deactivate the cruise. (T 962-66 [Craw.]; PEX 574 p. 38 [Roz.]; PEX 586 pp. 24, 62-65, 151-52 [Sero])
- Resistors – like "dams" – "limit the amount of current flow" in the IC.[2] Resistor arrays are clusters of smaller resistors placed on the IC "where you just want small amounts of current flowing." If a current were to substantially exceed the level that a resistor was set to allow, it "will pop

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[2] Resistors reduce current flow like dams reduce water flow: "If you have a small hole [in the dam], that is a large resistor, because it will resist water coming out. You'll get a real small trickle of water. If that hole is large, it won't resist much water at all and you'll get a lot of water out of that hole in the dam." (T 1010 [Craw.]; PEX 586 pp. 180-81 [Sero])

like a fuse," thus blocking further current, or (Sero claimed) create a short circuit, in either case leaving physical evidence. (T 1008-11, 1023-27 [Craw.]; PEX 586 pp. 70, 191-93 [Sero])

- Diodes – like "turnstiles" – allow electrical current to flow one way in the IC, but prevent it from flowing the opposite way. (T 1007-08 [Craw.])
- Capacitors – like "reservoirs" – "store" electrical charges (like transients) to prevent them from "affect[ing]" the IC. (T 1007-08 [Craw.])

Mrs. Peters' cruise control was turned off, and she did not press the brake – which all agreed would have stopped the car under any circumstances – during the accident. (PEX 586 pp. 64-65, 138, 141, 151-52 [Sero]; T 391, 498-99 [Wall.]) There was no physical evidence – like a blown resistor or short circuit – that the Oldsmobile's cruise control malfunctioned in the accident, and it worked "perfectly" afterward. (T 498-99 [Wall.]; PEX 586 pp. 45, 139, 144 [Sero])

B. Plaintiff's Expert And His Theory

1. The Expert

Plaintiffs' defect expert Sero has professed expertise related to TVs, elevators, deep fryers, video machines, hydraulics, lawn mowers, fork lifts, coffee makers, slip and falls, electrocutions, the sufficiency of lighting in parking lots, the placement of telephone poles near highways, and other matters. (PEX 586 pp. 10-11, 119-23 [Sero])

Sero's knowledge of cruise control systems comes from his work as a litigation expert. (PEX 586 pp. 7-8, 117-18 [Sero]) He has never designed one or any other

vehicle component. (PEX 586 p. 6, 115-16 [Sero]) He has never published anything subjected to peer review. (PEX 586 p. 117 [Sero])

GM moved *in limine* to exclude Sero's testimony, on the grounds that it was irrelevant, scientifically unreliable, and without foundation. (LF 1963-80) The court denied GM's motion (T 306), and at trial admitted Sero's testimony, offered by videotaped deposition, "pursuant to, not only the current objection, but also dependent on the pretrial matters [*in limine* motions] we covered during the trial." (T 549)[3]

2. The Theory

Sero testified that "pedal error" – when the driver mistakenly presses the accelerator instead of the brake – is normally the cause of sudden acceleration. (PEX 586 p. 128-29 [Sero]) He previously testified there is only one way to rule out pedal error: "You got to have witnesses." (PEX 586 p. 148 [Sero]). Without a witness to what pedal the driver pressed, "I can only prove that the vehicle is prone" to sudden acceleration, not that a malfunction caused a particular accident. (PEX 586 p. 148 [Sero]) Sero agreed that "if I can't totally eliminate" pedal error as an accident's cause, "then [pedal error] becomes pretty much of a probable" cause. (PEX 586 p. 129 [Sero])

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[3] GM had objected *in limine* to Sero's testimony, as well as that of witnesses Meads and Rozanski. (LF 1927-28; 1963-80; 2031-35; T 336) When each was offered at trial, GM stated and the court acknowledged that "all the objections we made are continuing." (T 543, 544, 549)

There were no witnesses to this accident. (PEX 586 p. 146 [Sero]) Sero nevertheless eliminated pedal error because he thought the Oldsmobile needed a continuing source of power to return "across a road and up a hill and then up" onto the timbers in the Peters' yard, and Mrs. Peters, unconscious after hitting the tree, could not have provided it. (PEX 586 pp. 13-17 [Sero]; 158 pp. 46-49 [Blatt]) Sero relied on plaintiffs' accident reconstructionist Jerry Wallingford, who opined that the car must "have [had] mechanical acceleration" to reach its point of rest. (T 405, 409, 432, 436, 466 [Wall.]) Wallingford's "mechanical acceleration," in turn, came from Sero's theory that the cruise control was powered at "full authority" – 80% of "wide open throttle" – throughout the accident sequence by Sero's theorized transient signal. (T:426-27, 492, 501-04 [Wall.]; PEX 586 p. 154 [Sero]) Wallingford admitted, however, that theory was "inconsistent" with the Oldsmobile's "interaction when it contacted the planter." (T:513 [Wall.])

Wallingford said it was impossible to calculate the Oldsmobile's speed after it hit the tree, but offered his "subjective opinion" – a "guesstimate" – that it had "very little speed, maybe five [mph]." (T 420-21, 507-10, 515-18 [Wall.]) He said it would be "physically impossible" for the car to have reached the timbers on its own momentum because the impact "takes too much energy, or too much speed out of the vehicle" and the "distance is too far." (T 420-21, 448, 451 [Wall.])

Thus, Sero concluded that the accident was caused by a design defect in the cruise control. Specifically, he opined that a "transient" voltage spike from the Oldsmobile's speed sensor passed through the resistor array (avoiding the capacitors and diodes),

entered the IC (which was switched off), actuated the vent and vac valves simultaneously, and thus accelerated the car backward at "wide open throttle of the cruise control" across the street, into the tree, and back into the Peters' yard. (PEX 586 pp. 30-31, 34-39, 44, 51-54, 57-58, 65-67, 93, 112-13, 136-37, 153-56, 189-91 [Sero])[4]

Sero tested his transient signal theory on the Peters' car. He used a "Fluke scope" to detect "current flow" on "the wires coming off the cruise control module" when, like in the accident, the car was on with the cruise control switched off. (PEX 586 pp. 46-52 [Sero]) Sero's Fluke scope detected "a spike in excess of 250 volts for a period of time" going into the IC from "the variable speed sensor." (PEX 586 pp. 57-58 [Sero]) This was "evidence of what [Sero] would call transient charges," his exact theory of what caused this accident. (PEX 586 p. 53 [Sero]) However, nothing happened. (PEX 586 pp. 169-70, 174 [Sero]) Sero has never been able to get the cruise control in the Peters' or any other car to activate due to his claimed transient voltage spike. (PEX 586 p. 159, 161-62 [Sero])

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[4] A "transient" is an electrical signal that is "random in nature" and "short-lived in duration," which Sero said was generated outside the cruise control. (PEX 586 pp. 53, 56-57 [Sero]) Sero claimed "the variable speed sensor which is an independent generator actually inputs voltage and signals into the cruise control module even when everything is turned off," by sending a voltage spike through the "mutual ground connector" between it and "the vac and the vent" valves. (PEX 586 pp. 57, 66 [Sero])

Under Sero's theory, Mrs. Peters could not have touched the brake during the first 118-foot stretch (when she was conscious) because even pressing it lightly would have activated the brake dump value, stopped the alleged malfunction in "less than a second," and slowed the car. (PEX 586 pp. 149-53, 195-96 [Sero])[5]

Sero acknowledged that all cars have transients, not a defect by itself. (PEX 586 p. 74, 175-76, 180 [Sero]) He opined a safer alternative design would have included resistors in the IC to protect against transients. (PEX 586 pp. 172-73 [Sero]) Had they been there, Sero swore, the car would have been reasonably safe and he would have looked for another cause of the accident, possibly pedal error. (PEX 586 pp. 180, 185 [Sero]) That theory proved problematic because those resistors *were* there: Sero, having never designed any car component (PEX 586 pp. 6, 115-16 [Sero]), had "no clue" that the term "RA" on the circuit board drawing he had been reading stands for "resistor array." (PEX 586 pp. 77-78 [Sero]) So informed, Sero responded that the four resistors in the array "aren't true resistors," but "resistor chips" and "are not susceptible to surges as

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[5] Even at the top speed of 22-25 mph, that 118-foot stretch would have taken more than three seconds to traverse. (25 miles/hour x 5,280 feet/mile x 1 hour/3,600 seconds = 37 feet/second; 118 feet x 1 second/37 feet = 3.2 seconds) GM's expert opined that Ms. Peters did not hit the brake during that time because when pedal error occurs, drivers may continue pressing the accelerator instead of removing their foot from the pedal because they "panic" and "think their foot is actually on the brake." (T 1354-58, 1363 [Young])

much as an integrated circuit chip piece would be [*sic*]." (PEX 586 pp. 78-79 [Sero]) He based that on "the [unspecified] literature," not testing. (PEX 586 pp. 188-89 [Sero])

Sero went on to opine that another safer alternative is the "stepper" cruise control that GM began using in the W car in 1994. (PEX 586 pp. 84-86 [Sero]) Sero said the stepper is less likely to malfunction due to a transient electric signal (but still might "given the right combination of things"), though he has never been able to prove such a malfunction is actually possible in the 3-mode cruise or, if possible, how likely. (PEX 586 pp. 86, 159, 176 [Sero])

3. Scientific Study

The National Highway Transportation Safety Administration ("NHTSA") spent 8 years studying sudden acceleration claims, which have been made against "all makes [and] models" of automatic transmission vehicles and "all manufacturers," targeting a variety of vehicle components, including brakes, transmissions, and cruise controls.[6] (T 1171 [Sinke]; 1365 [Young]; PEX 586 p. 91 [Sero]; PEX 640; DEX 1062) NHTSA formed a panel of independent experts, from "everywhere from MIT to Southwest Research Institute" (but not GM), to perform "an extremely scientific in-depth analysis of this whole phenomena." (T 1176-77 [Sinke]; PEX 586 at pp. 206-08 [Sero]; DEX 1062

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[6] NHTSA is charged by Congress to promulgate safety standards to meet the need for motor vehicle safety and to investigate potential or alleged safety-related defects in motor vehicles. *See* 49 C.F.R. §§ 554.1-.11. Its reports are entitled to "great credibility." *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 58 (Mo. banc 1999).

p. 2) The panel studied a variety of cars – including 3 GM cars (not the W) – and all major vehicle systems. (T 1182-83, 1202-03 [Sinke]; PEX 586 pp. 80, 210 [Sero]; DEX 1062 pp. 3, 5-6)

NHTSA concluded that "the probability of [sudden acceleration] resulting from cruise-control malfunction" – of any type – "is extremely remote." (DEX 1062 p. 12) Rather, "[f]or [sudden acceleration incidents] in which there is no [physical] evidence of throttle sticking or cruise-control malfunction" – as in this case – "the inescapable conclusion is that these definitely involve the driver inadvertently pressing the accelerator instead of, or in addition to, the brake pedal." (DEX 1062 p. 49; T 1177-78 [Sinke])

NHTSA's Canadian and Japanese counterparts, Transport Canada and the Japanese Ministry of Transport, also investigated sudden acceleration claims against a variety of cars and manufacturers, and also concluded pedal error rather than any "mechanical[]" problem was the most likely cause. (T 1366-67 [Young]; PEX 586 pp. 211-12 [Sero]; DEX 1061 p.5)

GM conducted three major studies of sudden acceleration in the 1970's and 1980's. (T 1169 [Sinke]) Engineers, under the direction of Robert Sinke, evaluated customer complaints and "brought [the subject vehicles] into the lab, began testing various kinds of vehicle components . . . [a]nd looked at everything that we could think of that could have possibly made any contribution, whatsoever, to those events that were being reported by customers." (T 1174 [Sinke])

GM reached the "same conclusion" as those government safety agencies – pedal error is responsible for many SAIs. (T 1183-84 [Sinke]) Accordingly, GM implemented

design changes to the height, feel, and placement of the accelerator and brake pedals to discourage drivers from inadvertently pressing the wrong one. (T 1175 [Sinke]) GM also identified possible mechanical or electrical explanations for SAIs, and conducted "roughly nine recall campaigns to correct vehicle problems," unrelated to transient signals, that "had contributed to either sudden acceleration or unintentional acceleration." (T 1174, 1184 [Sinke]; T 1004-06 [Craw.])

GM also investigated the role of single electrical faults – including transient signals – in sudden acceleration incidents. Transients, which can cause a variety of vehicle problems, have been a factor in GM design decisions since "the advent of electronic devices on cars." (T 991, 1006, 1118-19 [Craw.]; PEX 586. p. 74 [Sero]) In the late 1970s and early 1980s, GM built a "multi-million dollar" Electromagnetic Compatibility ("EMC") facility to test for "all known transients." (T 989-90, 993-94, 1001-02 [Craw.]) Those tests expose GM vehicles to transients at levels about "20 percent" higher than a driver "would experience in the real world" to ensure they "will not corrupt" various vehicle systems, including the cruise control. (T 1001-02, 924-25 [Craw.]) All GM cars, including Plaintiffs' Oldsmobile, go through months of EMC validation tests before they are sold to consumers. (T 994-1002 [Craw.], 1185-87 [Sinke]; PEX 586 p. 75 [Sero])

GM's testing revealed that single electrical faults, including transients, could potentially cause unwanted acceleration in the absence of "due care"; so GM designed its cruise control systems with a variety of protective devices – like the on/off and brake switches, resistors, capacitors, and diodes on the Oldsmobile (pp. 26-28, above) – to

prevent that from occurring in the real world. (T 1118-20 [Craw.]; PEX 574 pp. 38-39 [Roz.]; PEX 586 p. 183 [Sero]; *see also* PEX 572 pp. 15-17, 24-25 [Meads]; PEX 646 p. 3; PEX 579 p. 18195; PEX 582 p. 20792; PEX 748) To GM's knowledge, it never has. (PEX 572 p. 27 [Meads]; PEX 574 p. 37 [Roz.]; T 1040 [Craw.])

III. Allegations Of Other Sudden Acceleration Incidents

Plaintiffs offered allegations of sudden acceleration through 213 GM consumer complaint reports ("1241 reports") and seven trial witnesses. GM objected *in limine* that nearly all of the alleged incidents were hearsay and none could meet the "substantial similarity" test. (T 306-13, 363-93; LF 1937) The trial court denied the motion.[7] (T 306)

In opening, Plaintiffs told the jury "we're going to prove to you that the car was responsible for this accident . . . through the fact that it has happened to other people" (T 236), and "we will prove that this [accident] was due to the vehicle [through] prior incidents. People from around the country who have had the same thing happen to them." (T 243-44 ("hundreds of consumer complaints"); *see also* T 231, 478-79)

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[7] The court had previously ruled that any 1241 reports that were "not produced voluntarily by [GM] but were discovered by the Plaintiffs in the computer search of August 5, 2002, are hereby ordered to be admissible at trial under the business record exception to hearsay, to establish knowledge by defendant but not as to proof of the fact of a defect." (LF 1018) The court's ruling did not address other levels of hearsay in the reports or their (lack of) similarity to the accident. (*Id.*; T 311, 364-65) It did not apply to the many other 1241 reports GM had produced voluntarily. (LF 1018)

A. 1241 Reports

Through Wallingford, Plaintiffs offered 213 1241 reports of sudden acceleration in 1988-93 W cars. (T 478-79; PEX 228-30, 232-62, 264, 266-71, 273-81, 283-99, 301-27, 329-54, 356-63, 365-67, 369-406, 409-11, 413, 416-19, 421-26, 429-36, 438, 427-28) All of the reports, documenting customers' complaints, contained their hearsay statements. None identified the claimed incident's cause, let alone identified it as a design defect of any kind, much less a cruise control defect, still less a transient signal. Wallingford spoke to none of the people involved in the incidents (drivers or investigators) and inspected none of the vehicles. (T 486-87 [Wall.])

Instead, he identified 14 "criteria" to determine "whether there were incidents that in [his] mind were substantially similar to this incident," including whether the brake was applied before or during the acceleration, whether the vehicle had a cruise control, and if so whether it was turned on. (T 381-82 [proffer], 474-75 [Wall.]) However, many of the 1241 reports did not address those criteria, so "[a]s far as determining whether or not the incident was substantially similar" Wallingford relied on "[b]asically three":

- The vehicle accelerated without "direct driver input";
- The vehicle was initially in Park, and then was put into Drive or Reverse, or sometimes Reverse then Drive, which Wallingford called a "double event";
- The report does not identify any "vehicle problems" as "possible causal factors".

(T 382-83 [proffer], 476-77 [Wall.]) If those three (hearsay) criteria were present, Wallingford said, it established the "bare framework" that "would classify each event as a

sudden acceleration event." (T 385 [proffer], 476 [Wall.])

However, Wallingford admitted only 74 of those 213 "sudden acceleration" reports noted the presence of a cruise control and that, without one, the incident "would not be a substantially similar event."[8] (T 483, 488-89 [Wall.]) Wallingford said that did not matter to his analysis because he "was not addressing that particular subsystem on the vehicle." (T 388 [proffer]) He also failed to eliminate reports where "people claim to have had their foot on the brake," although there is "no evidence that Mrs. Peters braked in this accident" and Sero testified his theorized defect could not have occurred if she had. (T 390 [proffer], 489-90 [Wall.]; PEX 586 pp. 64-65, 151-52 [Sero]) Wallingford admitted he "cannot eliminate pedal error as a potential cause," at least in "some" of the reports. (T 391 [proffer], 490-91 [Wall.]) The court nevertheless overruled GM's renewed objections and admitted all 213 of the reports, but instructed the jury that they be considered proof only of notice, not defect. (T 363-65, 393, 469-72, 478, 483)

GM offered Dr. Douglas Young, an expert on "pedal error," to testify about "human factors" – how humans interact with machines and other aspects of their environment in various situations – which were (explicitly) left out of Wallingford's 1241 analysis and distinguished those reports from this accident. (T 1334, 1373-74 [Young])

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[8] Wallingford said that although he doesn't know the "precise number," it "appears that something in the range of approximately 80 percent of the [1988-1993] vehicles" had cruise control. (T 483-84 [Wall.]) By that estimate, 42 of the 213 report vehicles did not (213 x .20 = 42.6), so incidents involving them "would not be … substantially similar."

Plaintiffs objected that Young's testimony had not been disclosed at deposition. GM explained Young could not have formed, much less disclosed, his rebuttal opinions at deposition because Wallingford did not complete his 1241 analysis until trial. (T 1374-75 [Young]) The court excluded the testimony. (T 1375)

B. Witnesses

Plaintiffs then offered seven witnesses who said they had experienced sudden acceleration in GM cars – this time to prove both notice and defect. (T 532-34, 550-54, LF 2133-52) GM again objected on hearsay and dissimilarity grounds. (T 532-34, 536, 550-54, 556-58, 687, 690; LF 1937) No incident was shown to be caused by the cruise control, much less a transient signal. Indeed, only one witness testified to any possible cause – a warped floor mat. Six out of seven gave stories that foreclosed Plaintiffs' defect theory, for the witnesses claimed they pushed hard on the brake, but it did not stop the incident. Had Mrs. Peters pushed the brake, she undisputedly would have stopped the incident, even if her cruise control had somehow activated in the first place. (PEX 586 pp. 151-52 [Sero]) The court overruled the objections. (T 536, 554, 557, 687, 690)

Julie Benjamin put her 1993 Chevrolet Lumina in Reverse and it suddenly accelerated with the engine "revving" "at full throttle." (PEX 773 pp. 4-5, 7-8, 44-46 [Ben.]) She "pushed [the brake] as hard as [she] could," she "believe[s]" "all of the way to the floor," but the car continued to accelerate "until [she] hit a truck." (*Id.* pp. 7-8, 9-11, 39-40)

Mary Cutwright was shifting to Reverse in a 1990 or 1991 Chevrolet Lumina when it suddenly accelerated. (PEX 568 pp. 8, 11, 27 [Cut.]) She pushed the brake "as

hard as [she] could," but the car "continued to accelerate," "spinning like crazy." (*Id.* p. 46) The car shot across the street into the neighbor's house; her husband found it with the tires "spinning" and "the engine RPMs high." (*Id.* p. 32)

Dorothy Foy claimed two sudden acceleration events in her 1992 Chevrolet Lumina. In the first, the "moment [s]he put it out of park into reverse" "it took off, and it was a tremendous roar." (PEX 583 pp. 8, 11-12 [Foy]) Foy pushed the brake "as hard as [she] could," but "there was no brake." (*Id.* pp. 9, 11-12, 33) A few days later, Foy shifted the car from Park to Reverse and "that roar came back and [she] was out of that garage in a split second." (*Id.* p. 16) She, again, pushed the brake "as hard as she could," but the car kept going, hitting a tree. (*Id.* pp. 17-19)

Shirley Kelly described two acceleration incidents in her 1990 Pontiac Grand Prix after she put the car in Reverse. (T 649-50, 654-55 [S.Kel.]) Both times she "pushed very hard on the brake," but the car did not stop. (T 655, 660 [S.Kel.]) In a third, she shifted to Park and the engine "surged to 2000 RPMs"; the surge "ended" when she shifted to Reverse. (T 669 [S.Kel.]) Dan Kelly also said the car "took off" in reverse; he hit the brake "as hard as [he] could," but the car "started vibrating" and would not stop until he shifted to Park. (T 677-78, 685 [D.Kel.])

When Delores Major shifted her 1992 Lumina to Reverse, "a funny whining sound" got "really loud" and the car "just took off." (PEX 557 pp. 10-13 [Major]) She "just kept hitting the brakes," all the way "to the floor," but the car did not stop until it hit a tree. (*Id.* pp. 11-12, 14, 49-50) The engine was "[s]till racing" after the ignition was turned off. (*Id.* p. 15) A GM official inspected the car and found the floor mat "warped."

(*Id.* p. 34) His report said he "[a]sked owner and she stated she had always had a problem with the warped mat and it could have caused the problem."[9] (*Id.* p. 34) Major and her husband had had about ten other "similar" incidents where the car suddenly accelerated in Reverse, but braking had stopped the car. (*Id.* pp. 20-21, 55-56)

Clinton Blackwood said his 1992 or 1993 Lumina "shot back" when he "took [his] foot off the brake." (PEX 563 pp. 8, 11-12 [Black.]) He did not have time to reapply the brake before the car hit a tree. (*Id.* p. 12) He then said, over GM's hearsay objection, that a few days later "evidently" his mechanic "put it in reverse" and it "jumped back," then stopped when the mechanic "jammed the brakes on." (*Id.* pp. 17-19)

Plaintiffs went on to cross-examine GM witnesses extensively about those "214 [*sic*] cruise control [*sic*] incidents" from the dissimilar hearsay 1241 reports and their witnesses' other dissimilar stories, including Blackwood's mechanic's hearsay. (T 1088-1102 [Craw.]; 1199-1202 [Sinke]; 1391-1402 [Young])

C. Closing

In closing, Plaintiffs emphasized those incidents involving dissimilar circumstances and unknown causes: Listen to those witnesses who "weren't paid to testify" but "felt so strongly that this car had done this to them" and "didn't want this happening to someone else." (T 1453) Sero didn't have "all the answers," they said, but just look at the "[t]wo hundred-plus times it's happened." (T 1454)

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[9] Major did not believe "today" that the floor mat caused the incident, but her statement "would have been true at that time." (PEX 557 pp. 34-35, 58-59 [Major])

> And that's proof of what happened to Connie Peters that morning. What better proof is there about what happened that morning and what happens with this vehicle than what has happened to other people in the same vehicle. That's some of the best proof we have. (T 1453-54)

Plaintiffs told jurors to "ask for" the 1241 reports if they had "any doubts" about Mrs. Peters' car's "performance": "See what people who were driving this vehicle were telling [GM] about their car." (T 1508)

IV. Plaintiffs' Other Evidence

1. Meads And Rozanski

Former GM engineers Marshall Meads and Chester Rozanski were involved in the GM Cruise Control Center of Expertise's ("COE's") 1992 proposal (called a "corporate product performance objective" or "CPPO") that "No single point system failure shall cause a throttle advance." (PEX 577 p. 9560) The CPPO was proposed to ensure uniformity in cruise control design throughout the company, reduce overall life cycle costs, and be "defensible." (PEX 572 pp. 15-20 [Meads]; *see also* PEX 576 p. 22843) To meet the CPPO, the COE made a proposal for GM to switch from the 3-mode cruise control to the stepper motor cruise, over the course of the 1994-96 model years. (PEX 572 pp. 8-9 [Meads]; PEX 574 pp. 6-9, 34 [Roz.]; PEX 578 p. 20627, PEX 580 p. 20531, PEX 581 p. 20157, PEX 582 p. 20795; *see also* PEX 576 p. 22854-59 (the CPPO)) The COE proposed the switch for several reasons, including quality, reliability,

durability, performance, cost savings and system security. (PEX 572 pp. 18-21, 25-27 [Meads]; PEX 574 pp. 9-10, 20-21, 26-28 [Roz.]; PEX 580 p. 20511; PEX 578 p. 20627)

One reason for the COE's proposals was to prevent the possibility of a single fault (of some type), caused, for example, by "leaky transistors" or "poor solder joints" activating the cruise control. (PEX 574 pp. 13, 14 [Roz.]; PEX 572 pp. 15-17, 24-25 [Meads]; PEX 579 p. 18195; PEX 582 p. 20792; DEX 1062 p. 9; *see also* PEX 748)[10] The only indication that a single *electrical* fault could activate the cruise was that "we could hot wire" cars in the laboratory to simulate such a single fault, which was "something we didn't want to happen" in real life. (PEX 574 pp. 12-13 [Roz.]; PEX 572 p. 16 [Meads]) Neither Meads nor Rozanski (nor anyone) identified any instance in which a single electrical fault, including Sero's hypothesized transient, had activated the 3-mode in the real world. (PEX 572 p. 27 [Meads]; PEX 574 p. 37 [Roz.])

GM adopted the COE's proposal to switch from the 3-mode to the stepper motor cruise "across the board," without adopting the formal CPPO. (PEX 572 pp. 18, 22-25 [Meads]; PEX 574 pp. 18-22 [Roz.])[11] GM rolled out the stepper to "line up with the

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[10] "Single faults" include transients; "wear and chafing" "of the throttle cable" "due to engine movement"; "excessive forces within the throttle system"; "cable, lever and bracket interference"; "water intrusion"; insufficient "throttle return force"; "corrosion"; or a "loose throttle blade or bent throttle shaft." (PEX 748 pp. 308046-47)

[11] Meads did not know who made the decision not to adopt the CPPO, or why; he did not think GM management did. (PEX 572 p. 18, 25 [Meads]) In February 1992, Meads

volume that [supplier] AC Rochester was capable of supplying" as well as "when it was feasibly packageable into the vehicle." (PEX 574 p. 27 [Roz.]) The stepper was adopted for the W car with the 1994 model year. (PEX 574 p. 28 [Roz.])

2. Hughes

Hughes Aircraft studied cruise controls for GM in 1987-88 (PEX 646), while the 3-mode cruise was the industry standard. (T 937 [Craw.]; PEX 586 p. 21 [Sero]) Preliminary memos suggested investigating a number of potential causes of sudden acceleration, including electrical faults of various kinds. Later memos and the final Hughes report, following those investigations, contradicted Sero's defect theory.

Hughes' W.S. Gelon observed that some "spacecraft" had experienced "baffling behavior" caused by "a cosmic ray induced bit flip in RAM"; and, analogizing cars to spacecraft, asked, "Can similar bit flip(s) due to the noisy automobile environment cause an erroneous . . . message telling the engine . . . to accelerate uncontrollably?" (PEX 640 pp. 1-2) He discussed "the search for a single root cause" of "unwanted acceleration" and that one GM employee suggested investigating "how the cruise control interacted with the other system components." (PEX 641 p. 1). After meeting with GM engineers, presenting his spacecraft analogy, and discussing GM's automobile design, Gelon concluded his electrical fault hypothesis "could not be the root cause of a problem" due

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made a courtesy presentation to "an electrical subcommittee that shepherds these CPPOs on," and "they did a hatchet job on us." (PEX 572 pp. 25-26 [Meads])

to the "physical limitations" of the circuit board that "would not allow an upset to cause the auto to go open throttle and uncontrollably accelerate." (PEX 643)

Hughes' W.E. Swanson investigated "unwanted acceleration reports by some GM car owners." (PEX 645 p. 1) He stated that in "about 70%" of the cases, the claim had "some validity," meaning that "there were no identifiable mechanical or electrical faults," which left only two explanations: "the cruise control and the operator's foot." (PEX 644; PEX 645 p. 1) However, "[e]xtensive testing to date, including testing with incident cars, has failed to reproduce the experienced event." (PEX 645 p. 1) In all but one of the tested vehicles, the circuit board and cruise control "showed no electrical failures or anomalies when tested," and there was no way "to explain a failure mechanism" – like Sero's transient – "which allows the device to fail and then become fully operational again" (PEX 645 p. 2) One vehicle had suffered a "hard failure," that is, "catastrophic structural damage," easily found afterward. (PEX 645 p. 2)

The final Hughes report stated "the design of the Cruise Control module was found to be very resistant to single failures." (PEX 646 p. 3) Specifically addressing whether a single electrical fault could actuate the cruise, the report concluded that "a short circuit is possible" if – unlike here – "the conformal coating on the circuit board is punctured or otherwise damaged and [loose] conductive debris is present." (PEX 646 pp. 47-49)

V. Exclusion Of GM's Evidence

The parties disputed whether the Oldsmobile continued to accelerate until it came to rest in landscape timbers in the Peters' yard. Wallingford testified that the car must

"have [had] mechanical acceleration" – via the cruise control – to reach its point of rest. (T 405, 409, 432, 466 [Wall.]) GM's expert Moffatt testified that the car had sufficient momentum after slamming into the tree at about 20 mph to reach the timbers without mechanical acceleration. (T 1242, 1288 [Moff.])

In support of his opinion, Wallingford opined that both left-side tires crossed the timbers, which required "more speed." (T 405, 409, 432, 435-40, 451-52, 466 [Wall.]) Moffatt opined that only the left front tire crossed them. (T 1276-79, 1318 [Moff.]) However, Moffatt did not opine that only one tire *could* have crossed the timbers because there was insufficient momentum under his theory for two tires to cross. Nonetheless, Plaintiffs told the jury in opening that was Moffatt's opinion, and GM's whole case rested on it:

> Mr. Moffatt came up with a theory that [the car] did so on its own momentum. On its own momentum. In order to do that, he says that this car only crossed these landscape timbers with one tire. In other words, the back tire did not cross those landscape timbers.
>
> * * *
>
> General Motors' entire theory on how this accident occurred rests on one very important proposition, and that is, only one tire, only that front left tire [crossed the timbers].

(T 240-41)

When Moffatt tried to clarify that his opinion did not hinge on any "one-tire-versus-two" distinction, the court sustained Plaintiffs' objection that it was an impermissible "new opinion." (T 1280 [Moff.]) GM offered to prove that, to respond to Plaintiffs' argument, Moffatt had determined the car's speed assuming both tires crossed the timbers using the "same" "simple mathematical calculation" he had used to determine the car's speed assuming only one tire crossed. (T 1326-27 [proffer]; *see also* T 1266-67, 1280 [Moff.]) He found that the car would have separated from the tree traveling "less than one [mph] more" had both tires crossed the timbers than it would have had only one tire crossed – a speed "within the margin that [he] previously testified to." (T 1280 [Moff.], 1326-27 [proffer]) Moffatt confirmed that his opinion – that "the vehicle was not under power when it separated from the tree and came to rest in the landscape timbers" – would not change whether one or two tires crossed, and that the proffered opinion assuming two tires crossed was no different from those given at his deposition assuming one tire crossed. (T 1327-28 [proffer])

In closing, Plaintiffs argued that not just GM's theory of the accident – but GM's credibility – hinged on that imaginary "one-tire-versus-two" distinction Moffatt was not allowed to rebut:

> Now, why is it important whether it's one tire or two tires? Well, we know if there's two tires, there had to have been some acceleration to get it over those timbers. But it's more than that. If this defendant, General Motors, will come in

here and try to tell you that only one tire went over these landscape timbers, they'll try to tell you anything.

(T 1450-51)

VI. Directed Verdict Motions, The Verdict, And Post-Trial Motions

GM moved for a directed verdict on all claims after the close of Plaintiffs' case and the close of evidence. (T 848-851, 1423-31; LF 2647-48) The court denied the motions. (T 851, 1423, 1431) The jury rendered a general verdict for Plaintiffs against GM, and awarded Mrs. Peters $20 million compensatory damages (approximately $8.4 million economic and $11.6 million non-economic damages) and Mr. Peters $10 million for loss of consortium. (T 800-02 [Pett.], 1516-17; LF 2746-47)

The jury also found GM liable for punitive damages. (T 1515-17; LF 2746-47) A second phase of trial was held to set the amount. (T 1515) Plaintiffs' counsel told the court: "Frankly, Judge, I don't have any evidence" to present. (T 1515) Instead, he asked the jury for an award sufficient "to get that message across that this type of conduct will not be tolerated." (T 1517) The jury awarded $50 million. (T 1521; LF 2748)

The trial court awarded approximately $2 million in prejudgment interest on both the compensatory and punitive awards. (LF 2749-50) GM moved for judgment notwithstanding the verdict on all claims and for new trial or, alternatively, to remit the compensatory and punitive damages awards, and to amend the judgment to recalculate prejudgment interest only on the compensatory award. (LF 2751-2812) The court denied the motions. (LF 3193) This timely appeal followed. (LF 3188)

VII. Appeal

The appeal was briefed and on May 25, 2004 was argued to a three-judge panel of the Missouri Court of Appeals, Western District. On February 17, 2005, Judge Smith recused himself from the case. On May 6, 2005, the case was ordered re-argued en banc; that argument occurred on June 1, 2005. *Peters v. General Motors Corp.*, No. WD 62807 (Mo. Ct. App. W.D. June 1, 2005) (docket entry). On January 17, 2006, the Court issued its opinion reversing and remanding the case for a new trial by a 10-1 vote, and reversing and rendering punitive damages by a 9-2 vote. *Peters v. General Motors Corp.*, No. WD 62807, 2006 Mo. App. LEXIS 70 (Mo. App. W.D. Jan. 17, 2006). The court of appeals denied plaintiffs' motion for rehearing or transfer to this Court. This Court granted transfer pursuant to Rule 83.04.

POINTS RELIED ON

I. The Trial Court Erred In Submitting Plaintiffs' Strict Liability And Negligence Claims For Design Defect And Failure To Warn To The Jury, And Denying GM's Directed Verdict And Post Trial Motions Based On The Same, Because Plaintiffs' Liability Theories Required Them To Prove A Defect That Made The Product Unreasonably Dangerous And Caused This Injury, That GM Was Negligent In Connection With It, And That GM Failed To Warn About It, In That Plaintiffs' Testimonial And Other Evidence Was Not Substantial, Was Disproved, Or Was Nonexistent.

Mo. Rev. Stat. § 537.760 (2004)

Restatement (Second) Torts § 395

Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852 (Mo. banc 1993)

Mast v. Surgical Servs. of Sedalia, L.L.C., 107 S.W.3d 360 (Mo. App. W.D. 2003)

Abbott v. Haga, 77 S.W.3d 728 (Mo. App. S.D. 2002)

Weatherford v. H.K. Porter, Inc., 560 S.W.2d 31 (Mo. App. St. L. D. 1977)

II. The Trial Court Erred In Admitting Sero's Testimony, And Denying GM's Post-Trial Motion Based On The Same, Because His Testimony Did Not Meet The Standard For Admissibility Under Missouri Law, In That His Theory Was Unsupported (Actually Disproved) By Testing, Was Not Peer Reviewed Or Generally Accepted In The Scientific Community, Had An Unknown Potential Error Rate, And Was Contrary To The Evidence.

State Bd. of Registration for the Healing Arts v. McDonagh, 123 S.W.3d 146 (Mo. banc 2003)

Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993)

Jarvis v. Ford Motor Co., No. 92 Civ. 2900, 1999 WL 461813 (S.D.N.Y. July 6, 1999)

Rigali v. Kensington Place Homeowners' Ass'n., 103 S.W.3d 839 (Mo. App. E.D. 2003)

III. The Trial Court Erred In Admitting Evidence Of Other Alleged Sudden Acceleration Incidents, And Denying GM's Post Trial Motion Based On The Same, Because To Be Admissible Other Alleged Incidents Must Be Substantially Similar To Plaintiffs' Alleged Incident And Must Not Constitute Hearsay And Here Did Not Satisfy Those Admissibility

Requirements, In That The Other Incidents Were Dissimilar, Inadmissible Hearsay, Or Both.

Dillman v. Missouri Highway & Transp. Comm'n., 973 S.W.2d 510 (Mo. App. E.D. 1998)

Taylor v. Kansas City, 112 S.W.2d 562 (Mo. banc 1938)

Govreau v. Nu-Way Concrete Forms, Inc., 73 S.W.3d 737 (Mo. App. E.D. 2002)

State ex rel. State Highway Comm'n. v. Baker, 505 S.W.2d 433 (Mo. App. Spr. D. 1974)

IV. The Trial Court Erred In Excluding GM Expert Moffatt's Rebuttal Evidence To Plaintiffs' Claim That GM's Defense Hinged On Whether One Or Two Tires Crossed The Landscape Timbers, And Denying GM's Motion For New Trial Based On The Same, Because Evidence Is Admissible To Interpret Or Support A Previously Disclosed Opinion And To Rebut An Issue Injected Into The Case By Plaintiffs, And Was Admissible Here In That The Evidence Interpreted and Supported Moffatt's Previously Disclosed Opinion And Rebutted Plaintiffs' Trial Theory On The Central, Hotly Contested Question Whether A Defect In The Cruise Control Caused This Accident.

Mische v. Burns, 821 S.W.2d 117 (Mo. App. W.D. 1991)

Waters v. Barbe, 812 S.W.2d 753 (Mo. App. W.D. 1991)

Blake v. Irwin, 913 S.W.2d 923 (Mo. App. W.D. 1996)

Darnaby v. Sundstrom, 875 S.W.2d 195 (Mo. App. S.D. 1994)

V. The Trial Court Erred In Denying GM's Motion For New Trial And Refusing To Enter A Remittitur Of The Compensatory Damage Awards Because The Awards Are Grossly Excessive And Shock The Conscience In That They Are Grossly Disproportionate To Previous Awards In Comparable Cases, Unsupported By The Evidence, And Proof Of The Jury's Passion And Prejudice.

Toppins v. Schuermann, 983 S.W.2d 582 (Mo. App. E.D. 1998)

Mo. Rev. Stat. § 537.068 (2004)

Emery v. Wal-Mart Stores, 976 S.W.2d 439 (Mo. banc 1998)

Newman v. Ford Motor Co., 975 S.W.2d 147 (Mo. banc 1998)

Lohmann v. Norfolk & Western Railway, 948 S.W.2d 659 (Mo. App. W.D. 1997)

VI. The Trial Court Erred In Submitting Punitive Liability To The Jury, And Denying GM's Motion For Judgment Notwithstanding The Verdict Based On The Same, Because Plaintiffs Were Required, But Failed, To Prove By Clear And Convincing Evidence That GM's Conduct Created A High Degree Of Probability Of Injury And Constituted Complete Indifference To Or Conscious Disregard For The Safety Of Others, In That The Evidence Showed The Probability Of Injury Was, At Most, Minimal And GM Acted With Conscious Regard For Safety.

Rodriguez v. Suzuki Motor Corp., 936 S.W.2d 104 (Mo. banc 1996)

Alcorn v. Union Pac. RR. Co., 50 S.W.3d 226 (Mo. banc 2001)

Bhagvandoss v. Beiersdorf, Inc., 723 S.W.2d 392 (Mo. banc 1987)

Lopez v. Three Rivers Elec. Coop., Inc., 26 S.W.3d 151 (Mo. banc 2000)

VII. The Trial Court Erred In Refusing To Vacate Or Remit The Punitive Damage Award Because The Award Is Grossly Excessive, Unconstitutional and Shocks the Conscience In That GM's Conduct Was Not Reprehensible And The Award Is Grossly Disproportionate To Awards In Comparable Cases, Bears No Reasonable Relationship To The Compensatory Damages Award Or Applicable Fines, And Is The Product Of Passion And Prejudice.

Letz v. Turbomeca Engine Corp., 975 S.W.2d 155 (Mo. App. W.D. 2001)

BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996)

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991)

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003)

VIII. The Trial Court Erred In Denying GM's Motion For New Trial And In Refusing To Alter Or Amend The Judgment Because A Verdict Against A Non-Settling Party Must Be Reduced By The Amount Of Any Settlement Paid By Another Party And Prejudgment Interest Cannot Be Awarded On Punitive Damages, In That The Judgment Was Not Reduced By The Amount Of A Settlement And Included Prejudgment Interest On Punitive Damages.

Werremeyer v. K.C. Auto Salvage Co., 134 S.W.3d 633 (Mo. banc 2004)

Prayson v. Kansas City Power & Light Co., 847 S.W.2d 852 (Mo. App. W.D. 1992)

Sumners v. Sumners, 701 S.W.2d 720, 724 (Mo. banc 1985).

Mo. Rev. Stat. § 408.040.2 (2004)

ARGUMENT

Summary of argument. Plaintiffs were required, but failed, to prove GM's liability. Sero's opinion, offered to prove design defect, negligence and causation, proceeded in ignorance of the facts and contrary to them. His theorized defect was disproved in his own lab; rejected by NHTSA and all others to study it; unexperienced by anyone, anywhere in the real world; and contradicted by undisputed physical evidence and accident facts. His speculative *ipse dixit* was and is no substantial evidence of anything. Plaintiffs' other incident evidence, mostly hearsay, involving dozens of cars *without cruise controls*, cars whose drivers braked, and incidents caused by pedal error or literally who knows what also proved nothing about what happened here. Indeed, Wallingford's principle of selection for the incidents was that no one knew what caused them. Meads, Rozanski and the Hughes documents provided no evidence, because each discussed theoretical possibilities, not real world facts, and after study all concluded contrary to Plaintiffs' theory. Because their proof consisted of Sero's speculation and those irrelevant tales and rejected theories, Plaintiffs failed to make a submissible case on defect, negligence or cause on any theory. (Point Relied On I, below)

If GM is not awarded judgment, a new trial is required. (Point Relied On II-IV, VI, below) The admission of Sero's subjective, non-peer reviewed opinion expressly rejected by the relevant scientific community and disproved by his own testing – Plaintiffs' primary proof – was also reversible error. (Point Relied On II, below) So was the admission of those hundreds of dissimilar but highly prejudicial hearsay stories

offered to prove "what happened" here. Plaintiffs were required to prove each other incident substantially similar, including showing each had "the same cause" Sero posited here. Instead, most were expressly shown by their proponents to have had a different cause, and so on their face did and could prove nothing about what happened here. (Point Relied On III, below) Those errors were compounded by the prejudicial exclusion of GM's responsive evidence. (Point Relied On IV, below) These record-setting compensatory awards, the upshot of Sero's fanciful theory and those prejudicial errors, must be, if not reversed, substantially remitted. (Point Relied On V, below)

In any event, no evidence supported punitive liability. (Point Relied On VI, below) Punitive damages are to punish for the conscious disregard of a known problem. A problem cannot be known, much less consciously disregarded, where – like Sero's transient signal theory – it has never been shown to have manifested, ever before, anywhere. In fact, GM showed conscious regard for safety. It tested its industry standard 3-mode cruise control extensively, improved the design to avoid potential problems (unrelated to Plaintiffs' theory here), and recalled hundreds of thousands of cars where actual problems (also unrelated to this case) arose. With Hughes' help, it specifically investigated Sero's transient theory and concluded it unfounded. The cruise control on the Peters' car had the resistors Sero initially criticized it for omitting, as well as a power switch, capacitors and diodes, all designed to prevent Sero's hypothesized transient and all highly effective – Sero's transient was never shown to have evaded those protective devices in the real world ever before (or here). Having failed to prove a known (or any) problem with the 3-mode cruise, Plaintiffs' argument that GM should be punished for its

continued efforts to improve its products by switching to the stepper is perverse, contrary to the undisputed facts, and contrary to law.

The jury's punitive award was tainted by error, grossly excessive, and unconstitutional. The jury found punitive liability where no evidence supported it, then rendered its record-setting award, double any affirmed in Missouri and far beyond the bounds of the Constitution, common law and common sense. If not reversed, at a minimum it must be substantially remitted. (Point Relied On VII, below) The trial court compounded the error by awarding prejudgment interest on that excessive punitive award. (Point Relied On VIII, below)

I. The Trial Court Erred In Submitting Plaintiffs' Strict Liability And Negligence Claims For Design Defect And Failure To Warn To The Jury, And Denying GM's Directed Verdict And Post Trial Motions Based On The Same, Because Plaintiffs' Liability Theories Required Them To Prove A Defect That Made The Product Unreasonably Dangerous And Caused This Injury, That GM Was Negligent In Connection With It, And That GM Failed To Warn About It, In That Plaintiffs' Testimonial And Other Evidence Was Not Substantial, Was Disproved, Or Was Nonexistent.

Plaintiffs failed to make a submissible case on any of their liability claims. The judgment should be reversed and judgment entered for GM.

On appeal from a jury verdict, this Court "reviews facts in a light favorable to the verdict." *Budding v. SSM Healthcare Sys.*, 19 S.W.3d 678, 679 (Mo. banc 2000). However, the Court does not "supply missing evidence or give the plaintiff the benefit of

unreasonable, speculative, or forced inferences. The evidence and inferences must establish every element and not leave any issue to speculation." *In re Cokes*, 107 S.W.3d 317, 321 (Mo. App. W.D. 2003) (quotation marks omitted).

A. No Evidence Of Strict Liability Or Negligence

1. No Evidence Of Defect Or Cause

To prevail on their strict liability and negligence claims, Plaintiffs were required to prove that GM's cruise control was "in a defective condition unreasonably dangerous when put to a reasonably anticipated use," and that Mrs. Peters "was damaged as a direct result of such defective condition." Mo. Rev. Stat. § 537.760(3)(a) (strict liability); Restatement (Second) Torts § 395 (negligence); *see Rodriguez v. Suzuki Motor Corp*., 996 S.W.2d 47, 65 (Mo. banc 1999) (Mo. Rev. Stat. § 537.760 codifies the strict liability standard in Restatement (Second) Torts § 402A); *Stevens v. Durbin-Durco, Inc*., 377 S.W.2d 343, 346 (Mo. banc 1964) (Missouri follows Restatement (Second) Torts § 395 on negligence); *Williams v. Nuckolls*, 644 S.W.2d 670, 673-74 (Mo. App. E.D. 1982) (absence of proof of defect is fatal to both strict liability and negligent design claims). Plaintiffs failed.

a. Sero's Opinion

Plaintiffs' case relied on Sero's transient signal theory. As discussed in Point Relied on II, below, his subjective, unpublished, unaccepted, created-for-litigation opinion was inadmissible and thus no evidence of anything. *See Rigali v. Kensington Place Homeowners' Ass'n*, 103 S.W.3d 839, 845 (Mo. App. E.D. 2003) (inadmissible expert testimony could not support jury verdict); *see also Robertson v. Weinheimer*, 411

S.W.2d 197, 198 (Mo. banc 1967) (when testimony is inadmissible, "it will not be considered in our determination of the sufficiency of the evidence").

Even if admissible, the opinion cannot support the judgment. "[T]here is a distinction between the admissibility and the submissibility of expert testimony." *Abbott v. Haga*, 77 S.W.3d 728, 732 (Mo. App. S.D. 2002). Admissibility requires a reliable methodology, and is governed by specific statutory requirements. (Point Relied on II, below) Submissibility examines whether "the testimony of plaintiff's expert[] is so deficient in weight and credibility that it has little or no value," such as where it is contrary to the undisputed facts. *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 863 (Mo. banc 1993); *see also Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995) ("When an expert's opinion is based on assumed facts that vary materially from the actual, undisputed facts, the opinion is without probative value and cannot support a verdict or judgment.").[12]

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[12] GM submits that *Washington v. Barnes Hosp.*, 897 S.W.2d 611, 616 (Mo. banc 1995) did not erase that distinction or impliedly overrule *Callahan*. Indeed, *Washington* reaffirmed *Callahan*'s statement of the distinction, and its submissibility discussion addressed whether the expert's testimony was consistent with the evidence. *See Washington*, 897 S.W.2d at 616-18; *see also State v. Butler*, 24 S.W.3d 21, 53-57 (Mo. App. W.D. 2000) (Stith, J., joined by Ellis and Kennedy, JJ.) (under *Callahan*, expert testimony fundamentally lacking weight or credibility cannot make a submissible case); *id.* at 32-33 (Lowenstein, J., joined by Hanna, J.) (assuming "*Callahan* constitutes

Also, "[expert] testimony 'must be given to a reasonable degree of certainty.'" *Mast v. Surgical Servs. of Sedalia, L.L.C.*, 107 S.W.3d 360, 373 (Mo. App. W.D. 2003). Expert speculation is not evidence. "'When an expert merely testifies that a given action or failure to act "might" or "could have" yielded a given result . . . such testimony is devoid of evidentiary value.'" *Id.*; *see also Abbott*, 77 S.W.3d at 733 (speculative expert testimony not evidence, so party "was unable to make a submissible case").

Sero's opinion violates each of those rules. His "transient signal" theory was pure conjecture, was admittedly uncertain, ran headlong into the facts, was disproved by them several times over, and thus is no evidence.

First, Sero criticized the Oldsmobile for lacking resistors and swore the car would be safe if it had them. It had them. Sero, unaware of that fact, proved himself out of court. *Compare Rose*, 86 S.W.3d at 106 (evidence was sufficient to support conviction where "there was substantial evidence before the jury" supporting expert's opinion that defendant was intoxicated).

Second, Sero's own testing proved him out of court again. In his lab, Sero detected a "transient" from the variable speed sensor to the cruise control module, just

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authority for appellate review of the weight and credibility of an expert's opinion" on submissibility); *id.* at 35 (Spinden, J., joined by Smart, J., concurring in J. Lowenstein's opinion); *State v. Rose*, 86 S.W.3d 90, 106 (Mo. App. W.D. 2002) (considering, as part of sufficiency of the evidence inquiry, factual basis for the expert's testimony); *Abbott*, 77 S.W.3d at 732.

what he said caused this accident. However, directly contrary to his theory, the cruise control did not activate. Sero remedied that problem by opening the lid of the cruise control module and injecting voltage from "an external power source" directly into the IC "beyond the resistors that there are to protect the" vent and vac drivers in the real world. (PEX 586 pp. 159-62, 243 [Sero]) An expert's opinion disproved by his own testing under accident conditions, and supported only by testing that reverses those conditions, is the reverse of substantial evidence. *See Butler*, 24 S.W.3d at 54 (Stith, J., Ellis and Kennedy, JJ., dissenting) (expert's opinion contrary to science not submissible evidence).

Third, under Sero's theory, the transient signal needed voltage "in excess" of 250, but Sero did not know "how much." (PEX 586 pp. 173-74 [Sero]) Sero admitted he did not know – and made no attempt to find out – whether a transient strong enough to get through the resistor array and activate the cruise would have blown the resistors as Crawford opined, leaving physical evidence that did not exist here. In Sero's words: "all that is dependent upon how great was the shock that it experienced. So that's why I say, it may or may not. I don't know." (PEX 586 pp. 190-91 [Sero]). Thus, Sero admitted his ability to link his defect theory to this case was literally guesswork – "I don't know" is not evidence. *See Abbott*, 77 S.W.3d at 732 (expert testimony "that is equivocal will not rise to the level necessary for consideration of the evidence by the trier of fact" and "is of no probative value") (citation and quotation marks omitted).

Fourth, Sero's theory required the transient voltage to continue to power the Oldsmobile at "full authority" through the accident sequence.[13] However, if the hypothesized transient had blown the resistors – as Crawford testified it would and Sero could not dispute (*see* above) – without dispute it would have prevented further voltage through the IC (T 1037-40 [Craw.]), again rendering Sero's theory contrary to the undisputed facts. *See Burroughs*, 907 S.W.2d at 499; *compare Rose*, 86 S.W.3d at 106.

Fifth, Sero ventured that perhaps a transient strong enough to get through the resistor array would have short circuited the resistors (rather than blowing them). However, Sero could not – and made no effort to – confirm that hypothetical short circuit actually occurred, and admitted there was no such physical evidence, which would have been there if it had. (PEX 586 pp. 44-46, 90, 139-42, 190-91 [Sero]) Sero's conjecture contrary to the undisputed physical facts is no evidence twice over. *See Mast*, 107 S.W.3d at 373; *Abbott*, 77 S.W.3d at 733; *compare Washington*¸ 897 S.W.2d at 616-17 (expert testimony was substantial evidence when supported by facts in the record).

Sixth, Sero's theory was also disproved by Wallingford. Sero, not an accident reconstructionist, opined that the Oldsmobile came off the tree at nearly "wide open throttle" under "full authority" from the cruise control. (PEX 586 p. 154 [Sero]) Reconstructionist Wallingford, however, testified that opinion was "inconsistent" with the Oldsmobile's "interaction when it contacted the planter," where it came to rest with

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[13] Sero said his transient signal continued to power the car throughout the accident sequence until the engine stalled. (PEX 586 p. 155 [Sero]) It did not stall. (p. 24, above)

the engine idling. (T 513 [Wall.]) Moreover, based on Wallingford's "guesstimate" (T 421 [Wall.]) that the Oldsmobile was going 5 mph when it left the tree and Sero's opinion that it was at wide open throttle (PEX 586 p. 154 [Sero]), GM expert Moffatt calculated (without dispute) it would have been traveling 22.9 mph when it reached the planter. (T 1285 [Moff.]) Wallingford swore that even at 18-22 mph, "it would have just gone right over . . . and ran into some other trees on the other side of the driveway. We know it didn't have that much speed." (T 510 [Wall.]) Again, a theory at odds with both the physical evidence and one's own expert is no evidence. *Cf. Butler*, 24 S.W.3d at 54 (Stith, J., Ellis and Kennedy, JJ., dissenting) (opinion not supported by expert's own description of reliable scientific technique is not evidence).

Seventh, Sero agreed that under his theory the Oldsmobile would have had "an engine roar or a really loud sound" when Mr. Peters found it. (PEX 586 p. 156 [Sero]) However, when Mr. Peters found it, the car was idling, not roaring. (T 845-46 [Peters]) Sero was unaware of that dispositive fact in formulating his opinion (PEX 586 pp. 156-57 [Sero]), and thus proved himself out of court yet again. *See Callahan*, 863 S.W.2d at 863 (expert opinion that "is so deficient in weight and credibility that it has little or no value" is not submissible evidence).

Eighth, Sero responded that perhaps the transient signal "gradually" decayed. Under this new theory, "[b]ecause the faults we're looking at, the transient nature of them, they also have a – what's called a decay rate which means that they are at some [peak] level and they decay down to some lower level trying to get to zero." (PEX 586 p. 234 [Sero]) Thus, according to Sero, it was "conceivable" that the car ran at wide open

throttle across the street, back again, and onto (but not over) the landscape timbers, but then "returned to normal idle" in time for the sole percipient witness to find it. (PEX 586 p. 235 [Sero]) That "conceivable" miraculous coincidence was speculation, not evidence. *See Mast*, 107 S.W.3d at 373; *Abbott*, 77 S.W.3d at 733.

b. No Other Evidence Of Defect Or Cause

Their liability expert discredited, Plaintiffs played his deposition at trial, then turned to other purported evidence that his transient signal "defect" really did somehow manifest here. There was none.

Although "[the] existence of a defect may be inferred from circumstantial evidence with or without the aid of expert opinion evidence . . . when a plaintiff relies upon such proof, he does have the burden of establishing circumstances from which the facts necessary to prove his claim may be inferred, without resort to conjecture and speculation and the circumstances proved must point reasonably to the desired conclusion and tend to exclude any other reasonable conclusion." *Weatherford v. H.K. Porter, Inc*., 560 S.W.2d 31, 34 (Mo. App. St. L. D. 1977) (citations and quotation marks omitted); *Hale v. Advance Abrasives Co*., 520 S.W.2d 656, 658 (Mo. App. K.C.D. 1975) (same).

The seven witnesses' stories of sudden acceleration in GM cars prove nothing relevant here. None faulted the cruise control for their incidents, and no evidence showed it was to blame. Moreover, six of the seven said they pressed the brake, hard, making it impossible by Sero's own telling that his hypothesized transient signal caused the

problem. (pp. 39-41, above) The GM 1241 reports, also dissimilar, were in any event admitted only as evidence of notice, not defect.[14] (p. 38, above)

GM's engineers and documents did not say or suggest that a transient signal could cause a cruise control malfunction and leave no physical evidence. There is no doubt that a "single fault" can, in theory, "advance [the] throttle." Single faults include single electrical faults (as well as many other faults undisputedly irrelevant here like "chafing," "water intrusion" and "corrosion"), which in turn include transients. Meads had created a single electrical fault from hotwiring in the lab, but never said, and no evidence showed, that a transient signal could, as Plaintiffs hypothesized, bypass the resistors and other protective devices and activate the cruise in the real world without leaving evidence behind. (p. 43, above) To the contrary, all evidence showed the opposite. (pp. 27-28, 34, 45, above)

The Hughes documents, if relevant at all, refuted Plaintiffs' theory. Gelon and Swanson queried whether an electrical fault of some kind could activate the cruise, and both ultimately concluded that there "could not be" a transient signal like Sero's that leaves no evidence behind; there was no way "to explain a failure mechanism which allows the device to fail and then become fully operational again." The final Hughes Report reached the same conclusion, finding that for a single electrical fault to activate

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[14] The other incident evidence was inadmissible to begin with and so cannot support the judgment for that reason too. *See Am. Family Mut. Ins. Co. v. Millers Mut. Ins. Ass'n*, 971 S.W.2d 940, 942 (Mo. App. E.D. 1998). (Point Relied On III, below)

the cruise in the manner Sero described, it would "require[ ] both a breakdown in the protective coating" in the circuit board and "loose conductive debris" to "cause the short circuit." (pp. 44-45, above)

Connecting that evidence of facially non-probative incidents and unrealized and rejected possibilities to Plaintiffs' theory would be, at best, "a matter of conjecture and speculation"; that "is not sufficient to make a case for submission to a jury." *Hale*, 520 S.W.2d at 659. Certainly it does not "tend to exclude" the "other reasonable conclusion" that this accident was caused by the pedal error that Sero agreed is most common and "can't eliminate" but for his universally unproved and unanimously rejected transient theory. *See Weatherford*, 560 S.W.2d at 34. [15]

B. Not Unreasonably Dangerous

Under either strict liability or negligence, the "heart and soul" of a design defect case is "unreasonable danger." *Nesselrode v. Executive BeechCraft, Inc.*, 707 S.W.2d 371, 376 (Mo. banc 1986); *see Rodriguez*, 996 S.W.2d at 65; *Stevens*, 377 S.W.2d at 346; *see generally Aronson's Men's Stores, Inc. v. Potter Elec. Signal Co., Inc.*, 632 S.W.2d 472, 474 (Mo. banc 1982) (strict liability requires proof that product is "unreasonably dangerous"; negligence requires proof "that harm or injury is a likely result of acts or

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[15] Plaintiffs' circumstantial evidence theory is effectively *res ipsa loquitur*. But that theory was not submitted to the jury, *see Winkler v. Robinett*, 913 S.W.2d 817, 821 (Mo. App. W.D. 1995); and could not have been. *See Strick v. Stutsman*, 633 S.W.2d 148, 151-52, 154 (Mo. App. W.D. 1982).

omissions") (citation omitted). "Since practically any product, regardless of its type or design, is capable of producing injury . . . a manufacturer has no duty so to design his product as to render it wholly incapable of producing injury." *Stevens*, 377 S.W.2d at 347 (quotations omitted). "The law merely imposes on defendant the burden of designing and constructing reasonably safe vehicles." *Braun v. General Motors Corp.*, 579 S.W.2d 766, 771 (Mo. App. E.D. 1979) (as a matter of law, plaintiff failed to prove product design created an unreasonable danger).

Plaintiffs claimed the 3-mode cruise control was dangerous because susceptible to Sero's hypothesized transient signal. Without dispute, no evidence showed Sero's transient defect has manifested in the real world, ever. Sero had not attempted to calculate its alleged probability and could not produce it in his lab. (p. 31, above) It is not unreasonably dangerous or negligent to manufacture a product whose claimed defect has never been shown to manifest in the millions of cars on the road and whose proponent cannot force it to manifest under laboratory conditions.

Even assuming the claimed defect manifested for the first time here, without dispute Mrs. Peters could have stopped it and the car immediately at any time during the first several seconds by pressing the brake lightly, just a quarter of an inch. (p. 32, above) Thus, Sero's necessary and express assumption that Mrs. Peters did not touch the brake at any time, even lightly, is self-defeating. Giving full weight to Sero's unproved hypothesis that a defect caused the Oldsmobile to speed up, as a matter of law, an automobile is not unreasonably dangerous, nor is GM's conduct in designing and selling it negligent, where the purported defect would be remedied by the act any driver could

and would naturally take to avoid injury from it. *See Mothershead v. Greenbriar Country Club, Inc*., 994 S.W.2d 80, 89 (Mo. App. E.D. 1999) (affirming summary judgment because allegedly defective sled design gave rider the ability to steer and control the sled and thereby avoid danger); *cf. Aronson's Men's Stores*, 632 S.W.2d at 474 ("[w]hile [defendant's product] was arguably 'defective' as designed and installed, it was . . . certainly not 'unreasonably dangerous' as contemplated by" the Restatement).

C. Plaintiffs' Best Case Failed

The case should be reversed outright. "[A]n appellate court should reverse a plaintiff's verdict without remand only if persuaded that the plaintiff could not make a submissible case on retrial." *See Moss v. National Super Markets, Inc*., 781 S.W.2d 784, 786 (Mo. banc 1989) (remanding for new trial where plaintiff "now seeks to make use of the deposition of the defendant's store manager, not offered in evidence at the trial," and "[i]f this evidence had been received the jury could possibly" have found for plaintiff).

Remand is not appropriate here. Plaintiffs presented several expert witnesses, GM witnesses, third party witnesses, GM documents and literally hundreds of other incidents hand-picked by their expert. While we submit much of that evidence was inadmissible (*see* Points Relied On II-III, below), and insufficient even if admitted, there can be no claim that Plaintiffs would have more evidence to submit on remand. To the contrary, "[i]t is obvious from the record that the [plaintiffs] submitted the entirety of their evidence and no purpose would be served by a retrial of the issues." *See Strick v. Stutsman*, 633 S.W.2d 148, 154 (Mo. App. W.D. 1982). Outright reversal is appropriate.

If GM is not awarded judgment, a new trial should be ordered. We discuss the trial court's reversible errors in turn. (Points Relied On II-IV, below)

II. The Trial Court Erred In Admitting Sero's Testimony, And Denying GM's Post-Trial Motion Based On The Same, Because His Testimony Did Not Meet The Standard For Admissibility Under Missouri Law, In That His Theory Was Unsupported (Actually Disproved) By Testing, Was Not Peer Reviewed Or Generally Accepted In The Scientific Community, Had An Unknown Potential Error Rate, And Was Contrary To The Evidence.

Evidentiary rulings are reviewed for abuse of discretion. *Waters v. Barbe*, 812 S.W.2d 753, 757 (Mo. App. W.D. 1991); *Rigali*, 103 S.W.3d at 844. "Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Newman v. Ford Motor Co.*, 975 S.W.2d 147, 151-52 (Mo. banc 1998); *Waters*, 812 S.W.2d at 757. The trial court abuses its discretion when it admits evidence in disregard of legal standards. *See State v. Teague*, 64 S.W.3d 917, 922 (Mo. App. S.D. 2002) (error to disregard best evidence rule).

Sero's transient signal theory is "purely theoretical and speculative," *Jarvis v. Ford Motor Co*., No. 92 Civ. 2900, 1999 WL 461813, *5 (S.D.N.Y. July 6, 1999); "has not been tested as reliable in any other situations or by any other expert knowledgeable in the field," *Cox v. Delgado*, No. 97CV6286 (D. Colo. April 16, 1999) (LF 2013); and does not satisfy "the basic requirements of *Daubert*." *Smith v. Ford Motor Co*., No. 98-CV-

306-D (D. Wy. Feb. 24, 2000) (LF 2006).[16] The trial court abused its discretion in admitting it.

A. Standards For Expert Testimony

"[T]he standard for the admission of expert testimony in civil cases is that set forth in section 490.065." *State Bd. of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 149 (Mo. banc 2003), *rehearing denied*, 2004 Mo. LEXIS 21 (Mo. Jan. 27, 2004).[17] The factors that govern admissibility of an expert's theory under section 490.065 are:

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[16] *Jarvis* excluded Sero's transient signal theory, but admitted others. *See Jarvis*, 1999 WL 461813, at *3-9. Sero testified, falsely, that the exclusion was reversed. (PEX 586 p. 12 [Sero]) *See Jarvis v. Ford Motor Co.*, 283 F.3d 33, 48 (2nd Cir. 2002), *cert. denied*, 537 U.S. 1019 (2002).

[17] *McDonagh* was decided after the trial below. However, GM objected to Sero's testimony "[w]hether the court applies the *Frye* test, the *Daubert* factor analysis, or the language of RS Mo Sec. 490.065" (LF 1973-74) and specifically addressed the *McDonagh* factors. (LS 1976-79) After its 16-page *in limine* motion was denied, GM re-raised its objections, and the trial court acknowledged them, when the testimony was offered at trial. (p. 29 & n. 3, above) Therefore, contrary to the court of appeals' opinion, the error was preserved. *See Khan v. Gutsgell*, 55 S.W.3d 440, 442 (Mo. App. E.D. 2001) ("[T]he focus is on whether the stated objection gives opposing counsel and

(1) whether the theory can be and has been tested, *McDonagh*, 123 S.W.3d at 155;

(2) "whether the theory or technique has been subjected to peer review and publication," *id.*;

(3) the theory's "known or potential rate of error," *id.*; and

(4) its general acceptance in the relevant scientific community, *id.* ("this Court is not in effect readopting the *Frye* standard under another name"; rather, "such acceptance is but one factor of the relevant inquiry").

In addition, "section 490.065.3 expressly requires a showing that the facts and data are of a type reasonably relied on by experts in the field in forming opinions or inferences upon the subject of the expert's testimony. The Court must also independently assess their reliability." *Id.*

B. Sero's Theory

Sero's testimony fails all applicable standards.

1. Unsupported by Testing

Testing is an "important" factor "in determining . . . admissibility," *McDonagh*, 123 S.W.3d at 157, for it "distinguishes science from other fields of human inquiry." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593 (1993) (quotations omitted).

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the trial court reasonable grounds upon which to either rephrase the question or correctly rule on the objection.") (citations omitted).

No testing or other evidence shows Sero's hypothesized transient signal has ever produced sudden acceleration in the real world. (PEX 586 pp. 159-62 [Sero]) Sero "came up with" the theory, but has not validated it even in the lab and his own testing here disproved it. (pp. 31, 60-61, above) Sero rejected further testing as "time consuming" and requiring "follow-ups" and "resources." (PEX 586 pp. 159-62, 169-70, 173-75 [Sero]) Instead, Sero "simulate[ed]" the theory for this case by opening the lid of the cruise control module and injecting voltage from "an external power source" directly into the IC "beyond the resistors that there are to protect the" vent and vac drivers. (PEX 586 pp. 159-62, 243 [Sero]) That purported simulation was no such thing, because it failed to prove that the signal was able to travel through the resistor array in the IC designed to prevent it (but which he did not know was there), much less without leaving physical evidence. *See Jarvis*, 1999 WL 461813, at *5 (Sero's simulation does "not even establish[] that such an injected signal could emanate from any of the electrical components present in the [vehicle], or travel from its source to the" necessary destination).[18]

2. Unreviewed

[18] Sero said GM engineer Meads' ability to hotwire the circuit board and activate the cruise (*see* p. 43, above) showed a transient signal could get through the resistors. (PEX 586 p. 232 [Sero]) But Sero did not know whether Meads also injected the voltage inside the area protected by the resistors. (PEX 586 pp. 32-33 [Sero])

No peer reviewed literature, by Sero or anyone, suggests his transient electric signal theory is physically possible, given the variety of protections designed to stop it. (PEX 586 pp. 158-59 [Sero]) NHTSA's published study, and all other scientific study, specifically rejects it. (pp. 33-36, 44-45, above) *See Wagner v. Hesston Corp.*, No. 03-4244, 2005 U.S. Dist. LEXIS 13567, at *14-16, 24-25, 28-29 (D. Minn. June 30, 2005 (expert theories inadmissible where, among other things, evidence of peer review was "minimal" and "slim"), *aff'd*, *Wagner v. Hesston Corp.*, No. 05-3232, 2006 U.S. App. LEXIS 14033 (8th Cir. June 8, 2006); *Newman v. Motorola, Inc*., 218 F. Supp. 2d 769, 783 (D. Md. 2002) (lack of support for experts' opinions in governmental and scientific reports and inability of other scientists to replicate theory rendered opinions inadmissible), *aff'd*¸ 78 Fed. Appx. 292 (4th Cir. 2003); *Demaree v. Toyota Motor Corp*., 37 F.Supp.2d 959, 963-64 (W.D. Ky. 1999) (expert theory inadmissible because no peer reviewed literature supported it, theory was shared by no one, neither expert nor any one else had conducted tests that supported it, and NHTSA data did not support it).

3. Unacceptable Error Rate

Sero having disproved his theory in his lab, its known error rate is 100%. Its potential error rate is unknown, and thus limitless, since the hypothesized defect miraculously leaves no evidence, and is thus conveniently unverifiable. *Jarvis v. Ford Motor Co*., 69 F.Supp.2d 582 (S.D.N.Y. 1999) ("it is basic (and convenient) to Sero's theory that there will be no physical evidence that the electrical events occurred"). Sero's error-prone say-so is the opposite of science. *See In re Rezulin Prods. Liab. Litig.*, 369 F. Supp. 2d 398, 423 & n.156 (S.D.N.Y. 2005) (expert theory inadmissible because it had

"never . . . been published or subject to peer review . . . ," had "never been tested and necessarily has no error rate," and "to the extent aspects of the theory have been tested, the tests have tended to disprove the hypothesis"); *Peitzmeier v. Hennessy Indus., Inc*., 97 F.3d 293, 298 (8th Cir. 1996) ("[B]ecause [the expert] has not conducted any experiments or testing of any kind, there cannot be a known rate of error for his results. Likewise, no evidence is offered concerning a 'potential' rate of error.").

4. Unaccepted

Sero's phantom transient theory is not generally accepted, but universally rejected, in the relevant scientific community. NHTSA, the government agency charged with ensuring vehicle safety, rejected both Sero's single fault theory – finding that "two or more component failures are required to cause an unintended throttle opening" – and his conclusion that an electrical malfunction would not leave physical evidence. (DEX 1062 pp. 8-9, 49) The Hughes report also concluded that if a transient were somehow able to pass through the resistor array enter the cruise, it would leave physical evidence, and there was none here. (p. 45, above) Those conclusions, based on testing and scientific study Sero did not do, specifically reject Sero's theory, the opposite of *McDonagh*'s required acceptance.

5. Unsupported

Sero's opinion relied on nothing but his own discredited speculation and "simulated" test (that reversed the accident facts and so simulated nothing relevant here), and ignored and contradicted critical physical evidence. (pp. 30-33, above) Facts and

data that are non-existent or opposite the real ones are not the "type reasonably relied on by experts in the field." *See McDonagh*, 123 S.W.3d at 156.

6. Conclusion

Sero's untested, subjective *ipse dixit*, at odds with known facts and universally rejected, fails every admissibility standard. If it is not junk science, nothing is.

C. Prejudice

The admission of "incompetent evidence on a material issue is presumed prejudicial unless clearly shown [by the proponent] to be otherwise." *State ex rel. State Highway Comm'n. v. Baker*, 505 S.W.2d 433, 437 (Mo. App. Spr. D. 1974) (citations omitted). As Plaintiffs' only defect expert, Sero's testimony went "to the heart of plaintiff's case – the existence of a . . . design defect – and this reason alone may justify reversal." *Rodriguez*, 996 S.W.2d at 58; *see also Rigali*, 103 S.W.3d at 845 (improper admission of expert testimony "mandates reversal and remand"). Plaintiffs argued Sero's testimony was "very important"; "he actually pointed to it and said, here's the problem. It's the design." (T 1504, 1460 [closing]) Its improper admission was plainly prejudicial; Plaintiffs cannot "clearly" show otherwise. *Baker*, 505 S.W.2d at 437.

III. The Trial Court Erred In Admitting Evidence Of Other Alleged Sudden Acceleration Incidents, And Denying GM's Post Trial Motion Based On The Same, Because To Be Admissible Other Alleged Incidents Must Be Substantially Similar To Plaintiffs' Alleged Incident And Must Not Constitute Hearsay And Here Did Not Satisfy Those Admissibility

Requirements, In That The Other Incidents Were Dissimilar, Inadmissible Hearsay, Or Both.

Plaintiffs alleged the defect that caused this accident was a cruise control activated by a transient signal, causing unwanted acceleration. The alleged defect was not "sudden acceleration," which has many causes. Nevertheless, with obvious holes in their transient theory, Plaintiffs were permitted to introduce evidence of hundreds of other claims of "sudden acceleration" – from many different, unproved or unknown causes. The alleged incidents were unverified, based on hearsay, and not proved substantially similar. Scores were admitted dissimilar by their respective proponents. Their admission was an abuse of discretion several times over, and highly prejudicial. *See Waters*, 812 S.W.2d at 757.

Plaintiffs' transfer application, relating solely to this issue, raises phantom concerns and fails to address the real facts and law.

A. Standard of Review

Plaintiffs claim the court of appeals invented a "new standard of review" for the admissibility of other incidents, because "review is limited to whether the trial court determined that the evidence was relevant and that the occurrence bore sufficient resemblance to the injury-causing accident." (App. at 2, 8-11, citing *Newman v. Ford Motor Co.*, 975 S.W.2d 147, 151-52 (Mo. banc 1998)) Plaintiffs overreach. Whether the trial court applied the proper legal test is the beginning, not the end, of the inquiry; failing to apply it would be an abuse of discretion as a matter of law. *See Teague*, 64 S.W.3d at 922 (error to disregard evidentiary standards). Besides, *Newman* itself confirms that the substance of the trial court's analysis is also in issue:

> [j]udicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable people can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

Newman, 975 S.W.2d at 151; *accord Benedict v. N. Pipeline Constr.*, 44 S.W.3d 410, 421 (Mo. App. W.D. 2001) (court must review trial court's "finding that the complaints were logically relevant to the case"). The trial court's ruling cannot survive that standard.

B. Witnesses

Evidence of other incidents is inadmissible to prove a defect unless Plaintiffs prove the evidence is of an incident "of like character, occurring under substantially the same conditions, and . . . resulting from the same cause." *Dillman v. Missouri Highway & Transp. Comm'n.*, 973 S.W.2d 510, 512 (Mo. App. E.D. 1998) (affirming exclusion of other accident evidence where no evidence showed the cause of those accidents or conditions at the time they occurred) (quotations omitted); *see also Taylor v. Kansas City*, 112 S.W.2d 562, 566-67 (Mo. banc 1938) (reversible error to admit evidence that another person fell in the same manhole as plaintiff where the cause of the other person's fall was "left, if known, unrevealed"); *Drabik v. Stanley-Bostitch Inc.*, 997 F.2d 496, 509 (8th Cir. 1993) (reversible error to admit other incident evidence not "shown to be

substantially similar"); *Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 138, 140-43 (Tex. 2004) (same).

Plaintiffs called seven trial witnesses to tell the jury their irrelevant but frightening stories of sudden acceleration. Nothing showed a defective cruise control – much less a transient signal – caused any of their incidents. To the contrary, six of the seven said they pressed the brake "as hard as [they] could," "all the way to the floor," but the car did not stop. (pp. 39-41, above) That proves the testimony dissimilar, thus inadmissible, beyond any dispute; for everyone, including Sero, agreed Mrs. Peters did not press the brake and, if she had, even just a little, Plaintiffs' defect theory could not have occurred.[19] (p. 32, above)

Plaintiffs' application ignores that obvious, dispositive dissimilarity and its unavoidable logical and legal consequence: Incident A cannot help plaintiff prove a theorized defect caused Accident B where A's cause – whatever it was – is indisputably different than the defect plaintiff theorizes caused B. It is "clearly against the logic of the circumstances" to admit prior incidents where everyone agrees the cause there could not have been the cause here, because they logically prove literally nothing about the cause here. *See Newman*, 975 S.W.2d at 151; *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1269 (7th Cir. 1988) (reversible error to admit other incident; "There was no

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[19] The seventh witness was permitted to recite his mechanic's alleged incident. That hearsay was also inadmissible. *See Thornton v. Gray Automotive Parts Co.*, 62 S.W.3d 575, 584 (Mo. App. W.D. 2001); cases cited at p. 84, below.

evidence that [alleged defect] occurred in the [other incident] that would provide a link between that accident and the plaintiffs' theory of their case."); *Armstrong*, 145 S.W.3d at 137 ("None of the four lay witnesses could verify a defect as the cause of their acceleration incidents, much less a defect similar to that alleged by Armstrong.").

Plaintiffs' Application misstates and quibbles about the standard for proving and reviewing similarity, but misses the point. First, plaintiffs' cases say the same thing as GM's: the proponent of other incident evidence must prove that each and every one resulted from "the same cause." *Stokes v. Nat'l. Presto Indus., Inc.*, 168 S.W.3d 481, 484 (Mo. App. W.D. 2005); *Thornton v. Gray Auto. Parts Co.*, 62 S.W.3d 575, 583 (Mo. App. W.D. 2001); *Gerow v. Mitch Crawford Holiday Motors*, 987 S.W.2d 359, 364-65 (Mo. App. W.D. 1999); *accord Lopez v. Three Rivers Elec. Coop., Inc.*, 26 S.W.3d 151, 159 (Mo. banc 2000).[20] There is no conflict with the court of appeals' opinion. Second, evidence conclusively proved and admitted dissimilar by its proponent cannot reasonably or logically be found similar, under any standard of proof. *See Newman*, 975 S.W.2d at 151. Third, plaintiffs' "circumstantial evidence" cases are off point. (App. 8) No doubt defect and cause can (with limits) be proved by circumstantial evidence; other incidents, if admissible, are such evidence. However, those cases do not speak to, much less undo, plaintiffs' burden to prove such incidents admissible in the first place. Plaintiffs cannot bootstrap their way out of their obvious failure to meet that burden.

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[20] Plaintiffs insert the word "general" before "cause." (App. 6) Whatever they mean by that, it is not the law.

It was error to admit the testimony. *See Lopez*, 26 S.W.3d at 159.

C. 1241 Reports

GM created the 1241 reports to record consumers' claims of sudden acceleration, a phenomenon with many known causes, predominantly pedal error. (pp. 29, 34, above) No admissible evidence proved that the hearsay claims – reported by consumers to GM – happened as reported, much less that they were substantially similar to Plaintiffs' accident theory. To the contrary, Wallingford expressly disregarded 11 of his own 14 selected criteria to determine whether they were. (T 475-76 [Wall.]) His application of the other 3 criteria to establish the "bare framework" that "would classify each event as a sudden acceleration event" just begged the question whether they were.

Plaintiffs never answered the question. Indeed, many of the 1241 reports proved their own dissimilarity on their face, and Wallingford confirmed it. Nevertheless, it remains plaintiffs' burden to prove similarity, not GM's to disprove it. Incidents that the proponent fails to prove occurred "under substantially the same conditions" and "from the same cause" are inadmissible. *See Taylor*, 112 S.W.2d at 566; *Dillman*, 973 S.W.2d at 512.

Of the 213 reports admitted, Wallingford admitted only 74 noted the presence of a cruise control – an obvious, undisputed prerequisite for similarity – and conceded at least 42 were necessarily dissimilar because there was none. (p. 38, n. 8, above) In many other reports, consumers "claim to have had their foot on the brake," a fact Sero admitted proves his theory did not cause them. Wallingford admitted "some" likely involved pedal error, which plaintiffs concede is a disqualifying dissimilarity. (p. 38, above; App. at 6)

Others were selected because they identified a "double event" – Park-to-Reverse-to Drive – that did not occur here. (p. 37, above)

No report excluded pedal error or any unrelated human or mechanical factor as the cause of the incident, much less identified the cruise control (where present) as the cause. None of the incidents was shown to have "the same cause" – Sero's transient signal – alleged to have caused this accident.[21] To the contrary, and remarkably, having disregarded all meaningful criteria for similarity, Wallingford expressly chose them

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[21] Plaintiffs' assertion that GM admitted "that only cruise control malfunction or pedal misapplication could cause a sudden acceleration" (App. 4, 7) is false. While only the pedal or cruise control could have opened the throttle in the Oldsmobile, many events could have caused sudden acceleration in the unproved other incidents – including pedal error, warped floor mats, stuck throttle cables, or brake or transmission malfunctions. (pp. 36-41, above) *See Armstrong*, 145 S.W.3d at 137 ("Not only are there many potential causes [of sudden acceleration] (from floor mats to cruise control), but one of the most frequent causes (inadvertently stepping on the wrong pedal) is untraceable and unknown to the person who did it."). Moreover, cruise control malfunction can have many causes (p. 43 & n. 10, above); many have nothing to do with any defect, much less the transient theory alleged here. *See Ponder v. Warren Tool Corp.*, 834 F.2d 1553, 1560 (10th Cir. 1987) ("In determining whether accidents are 'substantially similar,' the *factors to be considered are those that relate to the particular theory underlying the case*.").

because they identified no "vehicle problem" as a "possible causal factor". (p. 37, above)[22] It was thus error to admit them. *See Teague*, 64 S.W.3d at 922 (error to disregard evidentiary standards); *contrast Newman*, 975 S.W.2d at 151-52 (plaintiff's seat back collapsed in an accident; evidence of *five* incidents involving collapsed seat backs in similar rear-end accidents admissible to determine seat belt's effect on an occupant whose seat had collapsed).

The trial court's limiting instruction did not cure the problem: (1) When offered to show notice, each other incident must be sufficiently similar "to call defendant's attention to the dangerous condition that resulted in the litigated accident," although it need not be "identical." *Govreau v. Nu-Way Concrete Forms, Inc*., 73 S.W.3d 737, 742 (Mo. App. E.D. 2002) (quotations omitted). Plaintiffs did not prove the other incident evidence was similar at all, much less sufficiently similar to put GM on notice of anything relevant here. To the contrary, the reports themselves, along with Wallingford and Sero, expressly proved much of it dissimilar. Thus, it was no more admissible for notice than for defect. *See Taylor*, 112 S.W.2d at 566. (2) Indeed, given the reports' dissimilarities – including the *lack of a cruise control* – the court's ruling "begs the question, notice of

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[22] Moreover, Wallingford had no personal knowledge of the alleged incidents. (p. 37, above) His purported foundation for them was thus "purely hearsay." *See Paige v. Mo. Pac. R.R. Co*., 323 S.W.2d 753, 756 (Mo. banc 1959) (affirming exclusion of other incident evidence where the witness's "knowledge concerning the other accidents was purely hearsay."); *Taylor*, 112 S.W.2d at 566.

what defect? If the relative defects are not similar, how can one be notice of the other?" *General Motors Corp. v. Moseley*, 447 S.E.2d 302, 307 (Ga. Ct. App. 1994) (reversible error to admit other incident evidence not proved similar), *abrogated on other grounds by Webster v. Boyett*, 496 S.E.2d 459 (Ga. 1998); *see also Mercer v. Pittway Corp.*, 616 N.W.2d 602, 616 (Iowa 2000) (reversible error to admit customer complaints for notice where the complaints showed other smoke alarms failed, but did not indicate why they failed). (3) Moreover, Plaintiffs urged the jury to disregard the court's limiting instruction, arguing that the reports showed "what happened" here. (pp. 41-42, above)

The incidents were not similar. Even if they were, their exclusion is "demanded when the evidence introduces many new controversial points and a confusion of issues would result, or there would be . . . an undue prejudice disproportionate to the usefulness of the evidence." *Trejo v. Keller Indus., Inc*., 829 S.W.2d 593, 596 (Mo. App. W.D. 1992) (quoting *Jones v. Terminal R.R. Ass'n of St. Louis*, 242 S.W.2d 473, 477 (Mo. banc 1951)). Other incident evidence is more prejudicial than probative where "it does not even suggest that the defect alleged by the plaintiffs exists," or that the "reported accidents were caused by that defect." *Brooks v. Chrysler Corp*., 786 F.2d 1191, 1198 (D.C. Cir. 1986). The 1241 reports do not suggest Sero's transient theory ever manifested, much less that the reported incidents were caused by it. At the very least, the probative value of the evidence (very little, if any) was far outweighed by its prejudice (great, Part D, below). *Trejo*, 829 S.W.2d at 596; *Mercer*, 616 N.W.2d at 616 ("any probative value" outweighed by "danger of unfair prejudice" where "the jury observed . . . 363 consumer complaints being admitted into evidence with the implication

that each [one] involved an incident similar to the [plaintiff's]," although none mentioned any defect or cause).

Other incident evidence is also subject to the hearsay rule. "Absent admissible evidence" regarding the cause of the other incident, its similarity "to the case at bar could not be properly established." *Thornton*, 62 S.W.3d at 584 ("Cleary, the court would have erred in permitting [the witness] to testify before the jury as to what he was told by others regarding the accident."); *Baker*, 505 S.W.2d at 437 (reversible error to admit hearsay statements of absent witness on central issue in the case). The reports – out-of-court statements recording others' out-of-court statements – were (at least) double hearsay. *See Armstrong*, 145 S.W.3d at 139-40 (Nissan's customer complaint database inadmissible hearsay). Plaintiffs were required, but failed, to establish an exception for each level of hearsay in each report. *See* Mo. Rev. Stat. § 490.680 (2004); *Evinger v. McDaniel Title Co.*, 726 S.W.2d 468, 474 (Mo. App. W.D. 1987) (trial court properly precluded party from refreshing a witness's recollection with hearsay document where it "failed to establish the three levels of hearsay were each within exceptions to the hearsay rule"); *State v. Thrasher*, 654 S.W.2d 142, 144 (Mo. App. E.D. 1983) (reversible error to admit "a hospital report containing hearsay statements of hospital personnel"). A trial court has no discretion to admit hearsay. *See Hamilton v. Missouri Petroleum Products, Co.*, 438 S.W.2d 197, 201 (Mo. banc 1969).

The court admitted some of the reports as business records as a discovery sanction against GM. (p. 36, n. 7, above; App. at 4-5, 10) However, Missouri law permits the trial court to exclude *admissible* evidence as a discovery sanction; but does not allow it to

admit *inadmissible* evidence. *See* Mo. R. Civ. Pro. 61.01. A trial court abuses its discretion by imposing a discovery sanction not authorized by law. *See Roth v. Roberts*, 672 S.W.2d 709, 710 (Mo. App. E.D. 1984) (error to impose sanction not authorized by rules of civil procedure); *Fuller v. Padley*, 628 S.W.2d 719, 722 (Mo. App. W.D. 1982) (error to impose monetary sanctions for failure to answer interrogatories where Rule 61.01 provides sanctions for failure to answer deposition questions). Plaintiffs' application does not mention that. Also, the sanction order did not address the 1241's dissimilarity – an independent legal bar – and approximately half the reports introduced at trial were not subject to it anyway. (LF 596-641) Plaintiffs' application does not mention that either.

The evidence was inadmissible, and its admission erroneous, many times over.

D. Prejudice

The hundreds of hearsay stories and frightening witness testimony about other incidents having nothing to do with this one literally took the place of Sero's discredited testimony and created an illusion of defect and corporate indifference to it. That error, presumed prejudicial, was poison here. *Baker*, 505 S.W.2d at 437 (admission of "incompetent evidence on a material issue is presumed prejudicial unless clearly shown [by the proponent] to be otherwise").

Plaintiffs cannot overcome the presumption of prejudice. Indeed, they set out "to prove . . . that the car was responsible for this accident" based on "hundreds" of complaints from people "from around the country who have had the same thing happen to them." (p. 36, above) GM was unable to question over 200 of the consumers who made

those supposed claims, but Plaintiffs questioned GM witnesses Crawford, Sinke and Young extensively about them (p. 41, above), and the court excluded Young's testimony offered to distinguish them. (pp. 38-39, above) In closing Plaintiffs' conceded Sero didn't have "all the answers" (an understatement), but re-directed the jury to those unproved, dissimilar, hearsay, but nevertheless frightening other incidents: "What better proof is there about what happened that morning and what happens in this vehicle than what has happened to other people in the same vehicle." (p. 42, above)

The erroneous admission of those inflammatory reports on that key issue requires reversal. *See Taylor*, 112 S.W.2d at 566 (reversible error to admit other incident evidence on a key, contested issue); *Felton v. Hulser*, 957 S.W.2d 394, 399 (Mo. App. W.D. 1997) (reversing where evidentiary error "materially affected the merits of the action"); *McJunkins v. Windham Power Lifts, Inc.*, 767 S.W.2d 95, 100 (Mo. App. S.D. 1989) ("prejudicially erroneous" to admit inadmissible evidence that "may have misled or confused the jury," particularly where the party "reli[ed] on it throughout the trial"); *see also Barker v. Deere & Co.*, 60 F.3d 158, 164-65 (3rd Cir. 1995) (court "unable to conclude" that "the error did not affect the outcome of the case" where plaintiff's "opening and closing argument contained references to . . . other accidents which were not similar to the [plaintiff's] incident"); *Drabik*, 997 F.2d at 508 (reversible error to admit other incident evidence not proved substantially similar).

IV. The Trial Court Erred In Excluding GM Expert Moffatt's Rebuttal Evidence To Plaintiffs' Claim That GM's Defense Hinged On Whether One Or Two Tires Crossed The Landscape Timbers, And Denying GM's Motion For New

Trial Based On The Same, Because Evidence Is Admissible To Interpret Or Support A Previously Disclosed Opinion And To Rebut An Issue Injected Into The Case By Plaintiffs, And Was Admissible Here In That The Evidence Interpreted and Supported Moffatt's Previously Disclosed Opinion And Rebutted Plaintiffs' Trial Theory On The Central, Hotly Contested Question Whether A Defect In The Cruise Control Caused This Accident.

The trial court erroneously excluded GM's evidence that directly rebutted Plaintiffs' claim – introduced for the first time at trial – that GM's entire theory of the case hinged on whether one or two of the Oldsmobile's tires crossed the landscape timbers. *See Waters*, 812 S.W.2d at 757 (evidentiary rulings reviewed for abuse of discretion). The error went to the heart of GM's defense, prejudiced it, and requires reversal.

A. The Error

GM's expert Moffatt theorized that Mrs. Peters' car reached its point of rest at the landscape timbers on its own momentum, not, as Plaintiffs alleged, under power from a defective cruise control. Plaintiffs repeatedly argued, incorrectly, that Moffatt's theory depended on his assumption that only one tire, not two, crossed the timbers. GM offered to prove, based on Moffatt's "same" "simple mathematical calculation" – previously disclosed in deposition – that had both tires crossed the timbers, the Oldsmobile would have left the tree traveling "less than one mile per hour more" than he previously opined – well "within the margin that [he] previously testified to." Thus, as Moffatt explained without contradiction, his testimony supported his previously-disclosed

opinion that the car crossed the timbers on its own momentum, and responded to Plaintiffs' opening statement assertion that the opinion and GM's entire defense depended on only one tire crossing. (p. 47, above) The court's exclusion of that testimony was error on three independent grounds.

First, "[t]estimony, even when phrased in the form of an opinion, that interprets or supports opinions contained in depositions is not improper." *Blake v. Irwin*, 913 S.W.2d 923, 931-32 (Mo. App. W.D. 1996); *see also Darnaby v. Sundstrom*, 875 S.W.2d 195, 203 (Mo. App. S.D. 1994) (reversible error to exclude exhibit and expert's discussion of it where the evidence "reinforced," but "did not change" the expert's opinion, and was injected into the case by the opposing party); *King v. Copp Trucking, Inc.*, 853 S.W.2d 304, 308 (Mo. App. W.D. 1993) (affirming no new opinion where expert testified at deposition that a G-force of .3 to .35 was "required to cause the rollover of a stable, loaded tractor trailer," but "did not apply the computation of G-force to this case," yet, at trial, testified the G-force required to cause a rollover of defendant's unstable trailer was "below .3 to .35"); *Tax Increment Financing Comm'n. v. Romine*, 987 S.W.2d 484, 487 (Mo. App. W.D. 1999) (affirming admission of an expert's real estate appraisal based on a previously-undisclosed comparable sale where the additional sale "did not change his estimate of fair market value"). Moffatt's proffered testimony, based on the "same"

analysis he disclosed at deposition, and supportive of the opinion expressed there, was admissible.[23]

Second, GM was entitled to respond to Plaintiffs' claim – first introduced at trial – that Moffatt's opinion and GM's entire case hinged on whether one or two tires crossed the timbers, whether its response was previously disclosed or not. *See Cooper v. Ketcherside*, 907 S.W.2d 259, 261-62 (Mo. App. W.D. 1995) (affirming grant of new trial based on erroneous exclusion of expert's new opinion where "exclusion of [the] testimony prevented [plaintiff] from rebutting an affirmative issue injected into the case by [defendant]"); *see also Waters*, 812 S.W.2d at 756-757 (reversible error to exclude testimony from "a witness called at the last minute to rebut the defendant's surprising and untruthful testimony").

Third, when a subject "has been voluntarily broached by one party, and such of its contents drawn off as serve to discredit the other or disparage his case, the relevant remainder may be examined, to the end that the sample produced may be more dependably analyzed in the light of the whole truth." *Mische v. Burns*, 821 S.W.2d 117, 119 (Mo. App. W.D. 1991) (internal quotations omitted). A "party who opens up a subject is held either to be estopped from objecting to its further development or to have

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[23] Judge Lowenstein believed this argument waived because Moffatt's deposition is not in the record. However, Moffatt's sworn offer of proof showed without contradiction that the opinion was not new. (p. 47, above) Besides, the other two independent grounds for admitting the opinion apply irrespective of the deposition testimony. (*See* text)

waived his right to object to its further development." *Id.* Plaintiffs should not have been allowed a free shot at Moffatt and GM.

B. Prejudice

A "new trial is mandated where a party was prejudiced by the improper exclusion of evidence." *Rodriguez*, 996 S.W.2d at 58. Whether a defect in the cruise control powered Plaintiffs' car was a central – and hotly contested – issue. The exclusion of Moffatt's rebuttal testimony prevented GM from disproving Plaintiffs' attack on his theory that it did not. That error requires reversal. *See Aliff v. Cody*, 26 S.W.3d 309, 321-22 (Mo. App. W.D. 2000) (court "cannot say the trial court's error did not affect the outcome of the case" where the excluded evidence "relates to causation, the *paramount* issue in the case"); *Wilson Court, Inc. v. Teledyne Laars*, 747 S.W.2d 239, 243 (Mo. App. W.D. 1988) (prejudicial error to exclude rebuttal testimony where the jury was "deprived of the full picture as to the claimed defect . . ., which, if presented might have changed the result"); *Siebern v. Missouri-Illinois Tractor & Equip. Co.*, 711 S.W.2d 935, 939 (Mo. App. E.D. 1983) (prejudicial error to exclude expert testimony on "critical" defect issue).

Plaintiffs took advantage of the court's ruling to attack not just Moffatt's theory, but GM's credibility: If GM "will come in here and try to tell you that only one tire went over these landscape timbers, they'll try to tell you anything." (p. 47, above) That attack also requires reversal. *See Rodriguez*, 996 S.W.2d at 58 (prejudicial error to exclude evidence where it left the "[defense expert's] credibility . . . subject to question, a point that plaintiff's counsel ably drove home to the jury"); *Stokes*, 168 S.W.3d at 485

(reversing; "Because of the circuit court's erroneous ruling, [plaintiff's] hands were tied during closing arguments to rebut [defendant's] misleading argument."); *State v. Simonton*, 49 S.W.3d 766, 785 (Mo. App. W.D. 2001) (reversible error to exclude "vital and integral" evidence where it allowed plaintiff to discredit the defendant's claim throughout trial and in closing argument).

V. The Trial Court Erred In Denying GM's Motion For New Trial And Refusing To Enter A Remittitur Of The Compensatory Damage Awards Because The Awards Are Grossly Excessive And Shock The Conscience In That They Are Grossly Disproportionate To Previous Awards In Comparable Cases, Unsupported By The Evidence, And Proof Of The Jury's Passion And Prejudice.

These enormous compensatory awards confirm that passion and prejudice resulted in a clearly excessive verdict that requires a new trial. *See, e.g., Toppins v. Schuermann*, 983 S.W.2d 582, 588 (Mo. App. E.D. 1998). If this Court does not grant GM judgment or a new trial, it should order a remittitur of the compensatory awards pursuant to Mo. Rev. Stat. § 537.068 (2004). The trial court's denial of remittitur is reviewed for abuse of discretion. *See Emery v. Wal-Mart*, 976 S.W.2d 439, 448 (Mo. banc 1998).

A. Mr. Peters' Award

The purpose of remittitur is to bring jury verdicts in line with prevailing awards and to avoid the delay and expense of a retrial. *Bishop v. Cummines*, 870 S.W.2d 922, 924 (Mo. App. W.D. 1994). The trial court abuses its discretion in denying remittitur when the verdict is so grossly excessive as to shock the conscience of the appellate court.

Emery, 976 S.W.2d at 448. Where, as here, the trial judge has denied a remittitur, if the appellate court chooses not to grant a new trial, upon finding an abuse of discretion the court should remit the award. *See Nat'l Bridge Co., v. Aylward Products Co.*, 829 S.W.2d 530, 533-34 (Mo. App. W.D. 1992).

Mrs. Peters' injuries undeniably affected her husband of over 20 years. (T 819-20 [R.Pet.]) Mr. Peters was "devastate[d]" by her accident, and visited her everyday. (T 816 [E.Pet.], 837 [R.Pet.]) However, his $10 million loss of consortium award is grossly excessive in light of "awards given and approved in comparable cases." *Emery*, 976 S.W.2d at 448. Mr. Peters' award is 25 times and $9.6 million higher than the highest consortium award in Missouri to survive an excessiveness challenge. *See Patrick v. Alphin*, 825 S.W.2d 11, 14 (Mo. App. E.D. 1992) (affirming $400,000 award where plaintiff's spouse sustained a "catastrophic" injury rendering him "unable to work or to participate in normal family and social activities. The condition requires considerable work and effort by family members to cope."); *see also Wright v. Barr*, 62 S.W.3d 509, 523 (Mo. App. W.D. 2001) (plaintiff's spouse suffered complete paralysis on one side of her body, a very compromised ability to communicate her needs, and needed 24-hour care, including "assistance in managing bowel and bladder care"; she was "unable to get in or out of bed, get in or out of a car, or get in or out of a chair independently"; loss of consortium award $300,000); *Newman*, 975 S.W.2d at 149 (plaintiff's spouse suffered from a fractured spine causing paraplegia; $500,000); *Pikey v. General Accident Ins. Co.*, 922 S.W.2d 777, 778-779 (Mo. App. E.D. 1996) (plaintiff's spouse suffered very serious brain injuries rendering him unable to communicate for weeks; $205,000).

Prior to this case, the largest reported loss of consortium award was $3,400,000 (reduced for comparative fault to $2,754,000). *See Lohmann v. Norfolk & Western Railway*, 948 S.W.2d 659 (Mo. App. W.D. 1997). The plaintiff's husband in *Lohmann* sustained serious brain injuries as well as other permanent and disabling injuries that rendered him unable to testify at trial. *Id.* at 663 n. 1. The defendant did not challenge the award on appeal. In any event, the jury's award – $2.9 million larger than the next highest award – is $6.6 million less than Mr. Peters' award.

The award should be substantially remitted.[24]

B. Mrs. Peters' Award

Mrs. Peters' left arm was amputated at the mid-forearm, requiring a skin graft. (PEX 147 pp. 7-9, 13 [Webb]) She suffered several skull fractures, has experienced "purposeful movement" in response to stimuli, but does not have "a lot of function" and has not made "significant communication" since the accident. (PEX 158 p. 52 [Blatt]; PEX 147 pp. 16-22 [Webb])

Despite her severe injuries, Mrs. Peters' $20 million award (including more than $11 million in non-economic harm) is also excessive when compared to other similar cases. Missouri courts have approved only one award in excess of this one. *See Alcorn v. Union Pacific R.R.*, 50 S.W.3d 226 (Mo. banc 2001) ($25 million award affirmed

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[24] For example, the average of the awards in *Lohmann*, *Pikey*, *Patrick*, *Newman*, and *Wright* is $961,000. If remitted to that amount, the award would still be more than twice the largest ever affirmed (in *Patrick*) in Missouri over an excessiveness challenge.

where plaintiff "suffered extremely serious, painful, debilitating and permanent injuries"); *see also Moore v. Bi-State Development Agency*, 87 S.W.3d 279, 284 (Mo. App. E.D. 2002) ($7,750,000 award for 14 year old plaintiff who suffered serious injuries, including brain damage); *Bank of America v. Stevens*, 83 S.W.3d 47 (Mo. App. S.D. 2002) (affirming $15 million award in a severe head injury case); *Lay v. P & G Health Care*, 37 S.W.3d 310, 316 (Mo. App. W.D. 2000) ($15 million award (reduced due to comparative fault to $9,252,500) to a plaintiff with extensive injuries (including his nose, left eye, and lower half of his face being sheared off and left hanging by skin); future pain and suffering included recurrent, chronic infections, requiring hospitalization and antibiotics; life expectancy 31 years); *Alcorn*, 50 S.W.3d at 249 (noting that "plaintiff's age" is a factor to consider).

Mrs. Peters' award should also be reduced in line with those cases.

VI. The Trial Court Erred In Submitting Punitive Liability To The Jury, And Denying GM's Motion For Judgment Notwithstanding The Verdict Based On The Same, Because Plaintiffs Were Required, But Failed, To Prove By Clear And Convincing Evidence That GM's Conduct Created A High Degree Of Probability Of Injury And Constituted Complete Indifference To Or Conscious Disregard For The Safety Of Others, In That The Evidence Showed The Probability Of Injury Was, At Most, Minimal And GM Acted With Conscious Regard For Safety.

Plaintiffs' punitive damages case centered on the theory that GM knew the 3-mode cruise was defective, but "quietly" improved it over several years (as opposed to

immediately), to save the company money. Plaintiffs argued: "NHTSA starts to do an investigation. They convince NHTSA it's all pedal error. Then Meads and Rozanski come in and say we've got a problem," so GM "told nobody," but "change[d] the part out very quietly over the next six or seven years. One year too late for Connie Peters." (T 1464-66)[25]

Plaintiffs' punitive damages premise fails. First, there was nothing to fix. GM designed numerous protective devices – the power switch, speed inhibitor, resistors, capacitors, diodes and brake shut-offs included on this car – that were without dispute highly effective to prevent Sero's hypothetical transient signal defect from manifesting in the real world. No such occurrence has ever been shown – on the road or even in the lab. All who examined Sero's theory that a transient could nevertheless occur but leave no evidence behind rejected it. NHTSA found the theory "virtually impossible," other national safety agencies discounted it; GM extensively tested and designed to prevent it; and Hughes and GM's own careful study could not replicate it and found the cruise "very resistant" to it. (pp. 33-35, 45, above) It is not punishable to design a product everyone believed was safe and was.

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[25] On appeal, plaintiffs abandoned their GM-quietly-fixed-it premise, arguing instead that GM engaged in "total inaction" and "failed to . . . heed the warnings of its [engineers]." (Respondents' Brief 103, 109) Neither premise is supported by any, much less clear and convincing, proof. (*See* text)

Second, there was no delay or cost savings. GM implemented the stepper cruise, an improved product, just as its engineers recommended, on the timetable they proposed. No evidence linked any decision regarding it to cost. It is not punishable to improve one's product. The award cannot stand.

A. The Legal Standards

Punitive damages are an "extraordinary" and "harsh" remedy that "should be applied only sparingly." *Rodriguez*, 936 S.W.2d at 110. "The remedy is, after all, imposed as punishment for and deterrence of bad conduct." *Alcorn*, 50 S.W.3d at 248. Punitive damages are appropriate only where the defendant "showed complete indifference to or conscious disregard for the safety of others" and its conduct "so egregious that it was tantamount to intentional wrongdoing," where "the natural and probable consequence of the conduct is injury." *Lopez*, 26 S.W.3d at 160.

Accordingly, something more than negligence or even gross negligence – *i.e.* "some element of outrage" – is required. *Bhagvandoss v. Beiersdorf, Inc.*, 723 S.W.2d 392, 397 (Mo. banc 1987); *Hoover Dairy Co. v. Mid-America Dairymen*, 700 S.W.2d 426, 435 (Mo. banc 1985) ("negligence, a mere omission of the duty to exercise care, is the antithesis of willful or intentional conduct"). That "something more" is "an evil motive" – a combination of a subjective intent to harm someone and knowledge of an objectively high probability that harm will in fact occur. *E.g.*, *Kansas City v. Keene Corp.*, 855 S.W.2d 360, 374 (Mo. banc 1993). In a negligence case, the standard requires that the defendant "knew or had reason to know" that its conduct "posed an unreasonable risk with a high probability that a substantial injury would occur." *Hoover Dairy*, 700

S.W.2d at 436. In strict liability, the defendant must have placed an unreasonably dangerous product in commerce with actual knowledge of its defect thus demonstrating reckless indifference to the rights of others. *Keene Corp*., 855 S.W.2d at 374.

To support a punitive award, a plaintiff "must meet the *clear and convincing* standard of proof." *Rodriguez*, 936 S.W.2d at 111. The evidence must "instantly tilt[] the scales in the affirmative when weighed against the evidence in opposition; evidence which clearly convinces the fact finder of the truth of the proposition to be proved." *Lewis v. FAG Bearings Corp*., 5 S.W.3d 579, 582-83 (Mo. App. S.D. 1999) (affirming grant of defendant's JNOV on punitive damages). Reversal is required if "a reasonable juror could not find," by clear and convincing evidence, that the defendant's conduct "created a high degree of probability of injury or constituted complete indifference or conscious disregard for the safety of others." *May v. AOG Holding Corp*., 810 S.W.2d 655, 663 (Mo. App. S.D. 1991); *Rodriguez*, 936 S.W.2d at 111. "In a search for clear and convincing evidence, the circuit court must scrutinize the evidence in much closer detail than it does in cases in which the standard of proof is a mere preponderance." *Lopez-Vizcaino v. Action Bail Bonds, Inc.*, 3 S.W.3d 891, 893 (Mo. App. W.D. 1999).

In determining whether the proof meets that high standard, this Court reviews the evidence in the light most favorable to Plaintiffs and gives them the benefit of all reasonable inferences. *May*, 810 S.W.2d at 657. However, "[n]o fact essential to submissibility [of the punitive damages claim] may be inferred in the absence of a substantial evidentiary basis." *Id.* at 663.

B. The Facts: Conscious Regard for Safety

Engineering judgment. GM rigorously tested the industry standard 3-mode cruise for all types of electrical problems under greater than real world conditions. It put every car's cruise control, including this Oldsmobile's, through months of testing to confirm its safe performance before it was sold to consumers. GM designed numerous safety features – including an on/off switch, a speed inhibitor, brake switches, diodes, capacitors and resistors – to prevent inadvertent acceleration for any reason. GM also designed the brake and accelerator pedals to discourage pedal error – the predominant cause of inadvertent acceleration according to NHTSA and everyone else who studied it. When testing revealed potential problems (unrelated to the defect alleged here), GM recalled hundreds of thousands of cars to fix them. When its engineers ultimately concluded the stepper cruise control was better, for several reasons, GM implemented it on the schedule the engineers proposed. (pp. 42-44, above)

That extensive testing and engineering record shows conscious regard, not disregard, for safety. It is what engineers should do. GM cannot be punished for doing it, and it would be perverse if GM could. *See Hostler v. Green Park Dev. Co.*, 986 S.W.2d 500, 507 (Mo. App. E.D. 1999) (vacating punitive damages award where "a party acts in good faith and honestly believes that his act is lawful"); *Lane v. Amsted Indus., Inc.*, 779 S.W.2d 754, 759 (Mo. App. W.D. 1989) (defendant's compliance with ANSI industry standards and custom "impinges to prove that the defendant acted with a nonculpable state of mind – without knowledge of a dangerous design defect – and hence to negate any inference of complete indifference or conscious disregard for safety").

The undisputed fact that Plaintiffs' alleged defect has never been shown to have caused sudden acceleration in the real world proves GM's engineering judgment was absolutely correct. Even if incorrect, punitive damages do not lie for errors in judgment. *See Bhagvandoss*, 723 S.W.2d at 398 (vacating punitive damages; where "defendant gave serious attention to the problem," "[e]ven if there are grounds for criticizing its procedures, the finding of complete indifference is not supported by the record"); *Ford v. GACS, Inc.*, 265 F.3d 670, 678 (8th Cir. 2001) (reversing denial of JMOL on punitive damages; "the fact that [defendant] worked to design a safer system belies the level of reckless indifference or conscious disregard for the safety of others necessary to support an award of punitive damages," even where defendant "did not implement those other designs for various reasons"); *Drabik*, 997 F.2d at 510 (reversing denial of JMOL on punitive damages; even where safety efforts insufficient, "[t]he point is that these actions belie an outrageous, wanton disregard for user safety which would support a punitive damage award").

Conformity with regulators' judgment. NHTSA, the federal agency charged with ensuring motor vehicle safety, found that "the probability of [sudden acceleration] resulting from cruise-control malfunction is extremely remote" and the risk that "intermittent [electrical] failures" could actuate the throttle without leaving evidence was "virtually impossible." Japan's and Canada's agencies agreed. (p. 34, above) GM cannot be punished for a risk those expert federal agencies found virtually impossible. *See Alcorn*, 50 S.W.3d at 248-49 (vacating punitive damages because "conformity with the regulatory process does negate the conclusion that the [defendant's] conduct was

tantamount to intentional wrongdoing"); *Miles v. Ford Motor Co.*, 922 S.W.2d 572, 589-90 (Tex. 1996), *aff'd in part, rev'd in part on other grounds*, 967 S.W.2d 377 (Tex. 1998) ("When a seller relies in good faith . . . on conclusions by the governmental agencies charged with administering safety regulations in the area of its product that the product is not unreasonably dangerous, it cannot be said to have acted with an entire want of care showing conscious indifference to the safety of the product users . . . [or to] an extreme degree of risk.").

Accordingly, the proof showed conscious regard for safety twice over. But even if it did not, the burden was on Plaintiffs to show conscious disregard. Plaintiffs failed:

C. First Failure of Proof: No Highly Probable Risk Of Substantial Injury

No evidence, much less clear and convincing evidence, showed Plaintiffs' alleged transient signal defect had ever manifested in the real world, anywhere. (Sero admitted he could not even verify, and his testing disproved, that it occurred here.) Any risk that it might occur was therefore miniscule, the opposite of "highly probable." *See Hoover's Dairy*, 700 S.W.2d at 436. Indeed, Sero failed to calculate "the rate of probability that [the alleged risk] could occur" and so obviously failed to prove by clear and convincing evidence that it was high.[26] *See Bhagvandoss*, 723 S.W.2d at 398 (reversing punitive damages where plaintiff's evidence of the danger –infection in defendant's non-sterile bandages – was "entirely unquantified" and no evidence showed "defendant knew of any

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[26] While Sero and Meads could cause a single-fault throttle advance in the lab, they did not, and Sero could not, do so under real-world conditions. (pp. 31, 43, above)

abnormal concentration"); *see also Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1058 (11th Cir. 1994) (reversing denial of JNOV on plaintiff's wantonness claim where the "actual incidence" of the danger – tire mismatch explosions – occurred in only "roughly one in millions," and the defendant "knew of only four [such] incidents").

Plaintiffs pointed to the 200-plus other sudden acceleration incidents – selected for their failure to identify a cause. Many failed even to identify the presence of cruise control or involved braking or pedal error, and none identified a defect in the cruise control, much less Sero's transient signal defect. Those dissimilar (and inadmissible) incidents proved nothing relevant, much less conscious disregard of a probable risk by clear and convincing evidence. *See Lopez*, 26 S.W.3d at 160.

Finally, under Plaintiffs' theory, unwanted acceleration is stopped, easily and immediately, by pressing the brake. Plaintiffs failed to prove why any driver could not or would not press the brake (as their other incident witnesses did but they claimed Mrs. Peters did not).[27] Thus, even if the theoretical defect could happen in the real world, there is virtually no risk of substantial injury because the driver could and would simply stop it, easily and immediately.

D. Second Failure of Proof: No Evil Motive

A defendant cannot be found to consciously disregard a highly probable risk of substantial injury, much less by clear and convincing evidence, where, as here, little or no

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[27] It is undisputed, however, that many drivers who experience pedal error continue to mistakenly press the accelerator rather than the brake.

risk exists. *See Lewis*, 5 S.W.3d at 584 (affirming JNOV on punitive damages where defendant had only "a vague and generalized knowledge of danger," not knowledge of "a high degree of probability that its actions would result in injury"); *Sutherland v. Elpower Corp*., 923 F.2d 1285, 1292 (8th Cir. 1991) (affirming JNOV on punitive damages where defendant knew its toy battery "might explode if improperly charged," not that "an explosion was naturally or probably going to occur"); *Hoover's Dairy*, 700 S.W.2d at 436 (reversing punitive award where defendant did not know that, by its failure to test or alleviate the problem, a "stray voltage would ultimately create an unreasonable risk involving a high degree of probability that substantial harm would result").

With no answer to that undisputed evidence, Plaintiffs offered two diversions:

1. False Premise One: "Convincing" NHTSA

Plaintiffs argued GM "convinced NHTSA" that pedal error, not a defect, caused sudden acceleration. (T 1464) No evidence supported that assertion. To the contrary, undisputed evidence showed NHTSA's conclusion that pedal error was the predominant cause of sudden acceleration resulted from an 8-year, "in-depth" scientific study conducted by a panel of "independent experts" from outside the automotive industry. NHTSA's conclusions were based on the panel's analysis of information from a variety of sources, examination of all major vehicle systems, and extensive testing. (DEX 1062 pp. 3-4; T 1202-03, 1209 [Sinke])[28] Two other government agencies – Japan's and

[28] GM, for its part, complied fully with NHTSA's information requests in connection with the study, and even "voluntarily" supplemented its responses after the study ended,

Canada's – conducted their own investigations and reached similar conclusions. Plaintiffs did not argue, much less provide evidence, that GM "convinced" them.

Plaintiffs complained that NHTSA may not have seen documents relating to the COE's proposal to switch from the 3-mode to the stepper. (T 1204-08) But it was undisputed that GM cooperated fully with NHTSA's investigation and provided all information it was required to, and then some. (n. 28, above) Plaintiffs' speculation that NHTSA would somehow have reached another conclusion had GM given the agency information it never asked for cannot justify submission of punitive damages. *See May*, 810 S.W.2d at 663. That speculation is also unconstitutional. *See Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 349-50 (2001) (private litigant's state law fraud-on-the-agency claim preempted due to its "inevitable conflict with [the Agency's] responsibility to police fraud consistently with the Agency's judgment and objectives").

In any event, "convincing" NHTSA would not make a safe product unsafe, turn engineering judgment into wantonness, or create conscious disregard of a probable and substantial risk where there was none.

2. False Premise Two: "Delaying" the Stepper

GM followed its engineers' recommendation to replace the industry standard 3-mode cruise with the stepper – an improved system that further reduced the risk of

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when, during "new vehicle prep" (before the car was sold), it found a "single point short circuit" – different from a transient – which had the "potential" to activate a cruise control if, unlike here, the cruise control was turned on. (T 1204-08, 1210-12 [Sinke])

throttle advance from a wide variety of potential single faults. Improving one's product is, of course, not punishable. Plaintiffs nonetheless argued that GM delayed switching to the stepper by rolling it out over three years – from 1994-96 – rather than all at once, and claimed the motive was cost-savings. No evidence, much less clear and convincing evidence, supported that thesis, and it would not warrant punitive damages if true.

First, there was no delay. Plaintiffs pointed to GM engineer Meads' testimony that an electrical subcommittee (not GM management) "did a hatchet job" on his proposed CPPO, but without dispute, GM management did exactly what his proposal called for – it switched "across the board" from the 3-mode to the stepper on the 1994-96 timetable Meads and the other COE engineers had proposed. (PEX 576, PEX 578 p. 20627, PEX 580 pp. 20514, 20530-31, PEX 581 p. 20157, PEX 582 pp. 20795, 20800; *see also* PEX 574 pp. 18-20, 34 [Roz.])

Second, cost was not a factor. Plaintiffs referred to documents that said engineers prefer the stepper "if we can afford it." (PEX 578, 580, 581, 582; T 692-93) But GM not only could "afford it," GM accomplished the change. Over GM's relevance and prejudice objections, the court admitted evidence relating to "Project 1800," an effort in the late 1980s and 1990s to "look at whether [GM] could take $1800 worth of cost out of their vehicles." (T 694-722, 1466; PEX 630-31, 633-34, 636-37; T 766, 1188 [Sinke])[29]

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[29] GM intended "to make sure [GM cars] were priced competitive[ly] in the marketplace" while "remaining competitive in features." (T 766, 1188 [Sinke]) The W car was chosen as the project's "lead vehicle" "[b]ecause of where it was in its

Plaintiffs argued the jury should be permitted to "infer" from Project 1800 that GM delayed changing from the 3-mode to the stepper "because of the atmosphere of cost cutting." (T 693)

However, Project 1800 did not, "in any way, relate to the cruise control on the subject vehicle, or any vehicle," and the project documents do not mention the cruise. (T 1191 [Sinke]; PEX 630-31, 633-34, 636-37) Cruise control engineers Crawford and Rozanski knew nothing of Project 1800, and neither it nor any other cost-saving goal was behind the decision to "roll out" the stepper motor system in place of the 3-mode system from 1994-96. (T 928, 936 [Craw.]; PEX 574 pp. 27-28, 41-42 [Roz.]) To the contrary, both engineers explained the stepper was rolled-out over three years – just as initially recommended – because of concerns about "volume" and "when [the stepper] was feasibly packageable into the vehicle." (PEX 574 pp. 27-28 [Roz.]; T 920-24 [Craw.]) Faced with that evidence, Plaintiffs did not bother to argue Project 1800 in closing. Their purported "inference" contrary to those undisputed facts failed to carry their burden as a matter of law. *See May*, 810 S.W.2d at 663.

Even if clear and convincing evidence supported Plaintiffs' "inference" of delay, it would not support punitive damages. A delay in improving the safety of a product does

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development." (T 764, 1188-89 [Sinke]) GM failed to reach its $1800 target "[m]ainly because of the cost increases in the product to add safety-type features." (T 765-66, 1190 [Sinke]) The savings GM did achieve came primarily "through improving the efficiency of the assembly plants" rather than reducing vehicle costs. (T 1190 [Sinke])

not prove "conscious disregard" for safety. *See Alcorn*, 50 S.W.3d at 248-49 (no "intentional wrongdoing" where defendant "was in the process of upgrading the [unsafe railroad] crossing at the behest of the state," even though defendant "ha[d] the option immediately to upgrade the crossing"); *May*, 810 S.W.2d at 662 (vacating punitive award where the defendant "intended to remedy" the alleged defective condition, but had yet to do so); *see also Burke v. Deere & Co.*, 6 F.3d 497, 512 (8th Cir. 1993) (Iowa law) (reversing denial of JNOV where decision to delay modifying product "was motivated by a savings . . . of approximately $2,700,000" and products "in the distribution pipeline" "were sold without the modification"; evidence of "calculated decision-making" to put profits over safety, not "scant evidence of an incidental economic benefit or monetary savings," is "required to justify an award of punitive damages"); *Lockley v. Deere & Co.*, 933 F.2d 1378, 1390 (8th Cir. 1991) (Arkansas law) (affirming directed verdict on punitive damages because "[a]lthough the evidence regarding the timeliness of [defendant's] responses to accident reports might very well have supported a finding of negligence, even gross negligence is not sufficient to justify punitive damages").

Indeed, delayed improvement is particularly inappropriate to justify punitive damages where a product's safety is a matter of reasonable dispute. *See Bhagvandoss*, 723 S.W.2d at 399 ("awaiting [the Food & Drug Administration's] studies before taking drastic action does not support a finding of 'complete indifference' and 'conscious disregard,'" "especially . . . because the studies gave no complete answer or definite guidance"). Here, the industry standard 3-mode cruise's safety was, best case for Plaintiffs, disputed. Sero admitted "reasonable engineers" could disagree with his

untested, unproved defect theory (indeed, NHTSA found it "a virtual impossibility"), and both NHTSA and GM concluded pedal error, not any defect, was the predominant cause of sudden acceleration. (PEX 586 pp. 200-01 [Sero]; pp. 21-23, above) *See Mercer*, 616 N.W.2d at 618 (reversing punitive damages where "room exists for reasonable disagreement over the relative risks and utilities of the conduct and the device at issue"); *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1317 (5th Cir. 1995) (vacating punitive damages where there was a "genuine dispute in the scientific community" regarding the safety of the design).

Punitive damages cannot lie on any theory.

E. A New Trial On Liability Is Required

Where a trial court improperly submits a claim for punitive damages, the entire verdict must be reversed and a new trial granted if "the evidence . . . does not warrant [the jury's] verdict" for actual damages, and "there was error sufficient to cause prejudice." *School Dist. of City of Independence v. U.S. Gypsum Co.*, 750 S.W.2d 442, 451 (Mo. App. W.D. 1988); *Love v. Deere & Co.*, 684 S.W.2d 70, 77 (Mo. App. W.D. 1985) (new trial required where erroneous submission of punitive damages "irreparably affected" "the award for actual damages").

Here, the evidence did not warrant the jury's verdict on actual damages, and error and prejudice are clear. Mr. Peters' $10 million loss of consortium award is an order of magnitude higher than the largest such award to survive an excessiveness challenge, and Mrs. Peters' $20 million injury award larger than all but one such award upheld, or rendered, in Missouri. (Point Relied On V, above) Plainly those awards, rendered in

grossly excessive $10 million increments, were "irreparably affected" by the erroneous submission of punitive damages, and Plaintiffs' baseless but prejudicial stories about Project 1800, "convincing" NHTSA, and "delaying" the stepper cruise. A new trial is required. *Love*, 684 S.W.2d at 77 (affirming new trial order overturning $100,000 actual damages award infected by the erroneous submission of punitive damages)).

VII. The Trial Court Erred In Refusing To Vacate Or Remit The Punitive Damage Award Because The Award Is Grossly Excessive, Unconstitutional and Shocks the Conscience In That GM's Conduct Was Not Reprehensible And The Award Is Grossly Disproportionate To Awards In Comparable Cases, Bears No Reasonable Relationship To The Compensatory Damages Award Or Applicable Fines, And Is The Product Of Passion And Prejudice.

Even if any punitive award could stand, this one cannot.

A. Legal And Constitutional Standards

The sole purpose of punitive damages is to punish and deter. *See Haslip*, 499 U.S. at 21-22. Federal and State due process commands punitive damages be reasonable in their amount and rational in light of that purpose. *See id.*; *Call v. Heard*, 925 S.W.2d 840, 849 (Mo. banc 1996). "In reviewing a punitive damages award for excessiveness, due process and reasonableness requirements compel consideration of the degree of reprehensibility of the defendant's conduct, the relationship between the punitive damages award and the harm or potential harm suffered by the plaintiff, and the difference between the award and the civil penalties authorized or imposed in comparable

cases." *Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155, 177-78 (Mo. App. W.D. 2001) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-75 (1996)).

The Due Process Clause of the 14th Amendment to the U.S. Constitution requires appellate courts to review punitive awards for excessiveness, applying the *BMW* criteria *de novo*. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 440 & n.14 (2001). Even if not unconstitutional, where the size of a jury's verdict is indicative of "bias, passion, and prejudice" a new trial must be ordered. *Letz*, 975 S.W.2d at 175. The denial of a remittitur on non-constitutional grounds is reviewed for abuse of discretion. *See Emery v. Wal-Mart*, 976 S.W.2d 439, 448 (Mo. banc 1998).

This award, the product of passion and prejudicial error (Points Relied On III-VI, above), is wholly unreasonable, and exponentially greater than necessary to punish and deter, in fact, infinitely greater, since GM did nothing to punish or deter here. It is unconstitutional and grossly excessive by any measure and every test.

B. Measure 1: Comparison to Other Awards

"Examination of other cases and awards is helpful in determining whether the award is excessive and shocks the conscience of the court." *Letz*, 975 S.W.2d at 179. This $50 million award is unprecedented in Missouri. It is nearly double and $23.5 million more than the largest punitive award ever approved in a published case, no matter how egregious the defendant's act, how vicious its intent, or how terrible the plaintiffs' injuries or even death. *See Letz*, 975 S.W.2d at 163-64, 180 (reducing punitive award from $67.5 million to $26.5 million for three plaintiffs in wrongful death action where defendants had actual knowledge of defects in certain parts of their helicopter design, but

failed to adequately notify persons operating the helicopters to avoid the cost of a recall and replacement).

Most punitive awards affirmed in Missouri have been under $1 million. *See, e.g.*, *Werremeyer v. K.C. Auto Salvage Co.*, 134 S.W.3d 633 (Mo. banc 2004) (affirming $20,000 punitive award for intentional fraud); *Krysa v. Payne*, 176 S.W.3d 150 (Mo. App. W.D. 2005) (affirming $500,000 punitive award for intentional fraud); *Wolf v. Goodyear Tire & Rubber Co.*, 808 S.W.2d 868 (Mo. App. W.D. 1991) (affirming $250,000 punitive award to plaintiff who suffered severe and debilitating head and facial injuries where defendant was found to have actual knowledge about the propensity of its tires to explode during inflation). The few over $1 million have been small fractions of this one. *E.g*. *Henderson v. Fields*, 68 S.W.3d 455 (Mo. App. W.D. 2001) (affirming $9 million punitive award in wrongful death action based on drunk driving); *Ellis v. Kerr-McGee Chemical, LLC*, No. ED74835, 1999 Mo. App. LEXIS 2127 (Mo. App. E.D. Oct. 26, 1999) (affirming $4 million punitive award resulting in serious spinal injury); *Reis v. Peabody Coal Co.*, 997 S.W.2d 49 (Mo. App. E.D. 1999) (affirming $2.5 million punitive award for intentional fraud). This award is far out of line.

C. Measures 2-4: The *BMW* and *Letz* Factors

"Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW*, 517 U.S. at 574. This grossly excessive award enters the "zone of arbitrariness" and violates

GM's due process rights. *Id*. at 568. It cannot withstand scrutiny under the guideposts established by the Supreme Court in *BMW* or this Court in *Letz*.

Reprehensibility. "Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *BMW*, 517 U.S. at 575; *see Haslip*, 499 U.S. at 22 (punitive damages may not be "grossly out of proportion to the *severity* of the offense"); *Letz*, 975 S.W.2d at 178. Here, GM's conduct was not reprehensible at all. To the contrary, GM relied on several years of testing by NHTSA as well as its own studies and investigations, which found the 3-mode cruise control was safe; designed the 3-mode with numerous protective devices to prevent sudden acceleration from any cause; and rolled-out an improved design, the stepper, just as its engineers recommended. The 3-mode was judged safe and proved safe in the real world. (Point Relied On VI, above) That is conscious regard – not disregard – for safety, and is not by any stretch the type of reprehensible conduct that a $50 million award is required to punish.

Ratio to Actual or Likely Harm. "The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is ratio to the actual harm inflicted on the plaintiff." *BMW*, 517 U.S. at 580. "Exemplary damages must bear a reasonable relationship to compensatory damages." *Letz*, 975 S.W.2d at 179; *accord BMW*, 517 U.S. at 582-83; *Haslip*, 499 U.S. at 18.

The jury's $50 million punitive award is nearly twice the already excessive $30 million compensatory award. However, where compensatory damages are "substantial," a 1:1 ratio may be "the outermost limit of the due process guarantee." *State Farm Mut.*

Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S. Ct. 1513 (2003).[30] This ratio is nearly twice *State Farm*'s outermost limit, applied to an obviously "substantial" compensatory award 30 times higher than the $1 million award in *State Farm*. That is constitutionally backward; the ratio should be lower, not higher, the larger the compensatory award. *See BMW*, 517 U.S. at 582.

Pursuant to *State Farm*, the Supreme Court has vacated the punitive award in a products liability case involving physical injury resulting in death, where the $15 million punitive award was 5 times the $3 million compensatory award. *See* U.S. Supreme Court Order No. 02-1096 (May 19, 2003) (vacating and remanding *Ford Motor Co. v. Smith*). *See also Boerner v. Brown & Williamson Tocacco Co.*, 394 F.3d 594, 602-03 (8th Cir. 2005) (reducing $15 million punitive award to $5 million, approximately 1:1 ratio; notwithstanding "highly reprehensible" conduct, "a low ratio" was appropriate given substantial compensatory award); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004) (reducing $6 million punitive award to $600,000, equal to compensatories, for persistent race discrimination).

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[30] In *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993), where economic damages were low and the conduct was malicious and intentional, the ratio of punitive damages to the potential harm to plaintiffs was "not more than 10 to 1." *BMW*, 517 U.S. at 581. In fact, "the jury could well have believed" that potential compensatory harm was "multimillion dollar," so the $10 million punitive award was closer to 2-to-1 or less. *See TXO*, 509 U.S. at 461-62.

This substantial, indeed excessive, $30 million compensatory award (10 times larger than in *Boerner*, 10 times larger than in *Smith*, 30 times larger than in *State Farm*, and 50 times larger than in *Williams*) dictates that this ratio should be much smaller than the outermost constitutional limit. Indeed, if allowed to stand, this compensatory award, or even a much smaller one, would be more than sufficient to punish and deter, were either warranted. *See State Farm*, 538 U.S. at 419 ("[P]unitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.").

In fact, neither is warranted. Again, the car was extensively tested, judged safe by GM and the federal government and proved safe in the real world. (Point Relied On VI, above) Certainly there was no conduct here deserving of a ratio at "outermost limit of the due process guarantee" for the worst conduct imaginable. *See also State Farm*, 538 U.S. at 427-28. Were any substantial compensatory award to stand, the punitive award must be reduced well below that outermost constitutional limit.

Comparison to penalties. This court must "[c]ompar[e] the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." *BMW*, 517 U.S. at 583. Courts should "accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue." *Id*. at 583 (quotation omitted). No legislature condemns GM's conduct here; to the contrary, GM's conduct conformed to the judgment of the industry and the federal agency charged with regulating it. Deference to that judgment requires that the sanction be zero.

D. Improper Measure: GM's Financial Condition

"[P]laintiffs [should] not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." *Haslip*, 499 U.S. at 22; *BMW*, 517 U.S. at 591 (wealth cannot "make up for the failure of other factors, such as 'reprehensibility.'") (Breyer, J., concurring). The $50 million punitive award – unprecedented in size and unsupported by evidence of reprehensible conduct – cannot be justified by GM's ability to pay it. *See also State Farm*, 538 U.S. at 427-28.

The punitive award, the product of passion, prejudice and unconstitutional excess, must be reversed, or at a minimum substantially remitted.

VIII. The Trial Court Erred In Denying GM's Motion For New Trial And In Refusing To Alter Or Amend The Judgment Because A Verdict Against A Non-Settling Party Must Be Reduced By The Amount Of Any Settlement Paid By Another Party And Prejudgment Interest Cannot Be Awarded On Punitive Damages, In That The Judgment Was Not Reduced By The Amount Of A Settlement And Included Prejudgment Interest On Punitive Damages.

The trial court erred in awarding some $2 million prejudgment interest on the punitive award. That error of law is reviewed *de novo*. *Hoskins v. Business Men's Assurance*, 116 S.W.3d 557, 580 (Mo. App. W.D. 2003), *overruled on other grounds by* 134 S.W.3d 633 (Mo. banc 2004).

At the time of trial, prejudgment interest was not permitted on punitive damages. *Id.* at 581-82; *see also Anderson v. Shelter Mut. Ins. Co.*, 127 S.W.3d 698, 702-03 (Mo. App. E.D. 2004), *overruled by* 134 S.W.3d 633 (Mo. banc 2004); *Werremeyer v. K.C.*

Auto Salvage Co., No. WD61179, 2003 WL 21487311, at *15 (Mo. App. W.D. June 30, 2003), *overruled by* 134 S.W.3d 633 (Mo. banc 2004) . Prejudgment interest on the compensatory award is 9% annually, starting 60 days after the offer was made. Mo. Rev. Stat. § 408.040.2. Plaintiffs made their settlement demand on July 24, 2002. Sixty days thereafter was September 22, 2002. The court entered judgment on January 7, 2003, 107 days later. Therefore, were the compensatory awards to stand, Mrs. Peters would be entitled to $527,011.63, and Mr. Peters $263,835.62.[31] If the compensatory awards are remitted, the interest should be reduced accordingly.

Werremeyer, 134 S.W.3d at 637, which later expressly overruled the *Hoskins* line of cases, does not change that result. First, entitlement to prejudgment interest – triggered by an unaccepted settlement demand and designed to promote settlement – is procedural, so changes to the law by judicial opinion do not apply retroactively. *See Prayson v. Kansas City Power & Light Co.*, 847 S.W.3d 852, 855 (Mo. App. W.D. 1992).

Second, "fundamental fairness" requires the same outcome. *See Sumners v. Sumners*, 701 S.W.2d 720, 724 (Mo. 1985). *Sumners* established a three-part test:

(1) This Court's *Werremeyer* decision established "a new principle of law . . . by overruling clear past precedent." *Sumners*, 701 S.W.2d at 724. Before it, there were "no

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[31] Plaintiffs did not dispute below that Mrs. Peters' award must be offset by their $25,000 settlement with Defendant Moffett's Auto Works. (LF 3096) *See* Mo. Rev. Stat. § 537.060 (2004). Thus, the interest calculations on the current awards are: $19,975,000 x 9% x 107/365 = $527,011.63; $10,000,000 x 9% x 107/365 = $263,835.62

Missouri cases in which prejudgment interest on punitive damages has been awarded," *Werremeyer*, 2003 WL 21487311, at *15; and this Court specifically "overruled" the court of appeals precedent to the contrary. 134 S.W.3d at 637.

(2) Applying the new rule retroactively would not enhance its purpose or effect. *See Sumners*, 701 S.W.2d at 724. Prejudgment interest is to "compensate[] claimants for the true cost of money damages they have incurred due to the delay of litigation" and "promote[] settlement and deter[] unfair benefit from the delay of litigation." *Brown v. Donham*, 900 S.W.2d 630, 633 (Mo. banc 1995). A retroactive award of prejudgment interest cannot promote settlement or discourage delay because the decision not to settle occurred years ago. *See Trans UCU, Inc. v. Dir. of Revenue*, 808 S.W.2d 374, 378 (Mo. banc 1991) (declining to apply retroactively a new tax interpretation because the transaction subject to the tax was completed when the rule was established). "No deterrent effect can take place . . . by applying a new rule to an incident which occurred [more than] five years before that rule was established." *Spotts v. City of Kansas City*, 728 S.W.2d 242, 249 (Mo. App. W.D. 1987). Similarly, retroactive application would not compensate plaintiffs for lost time value of money. "[P]unitive damages are remedial and a plaintiff has no vested right to such damages prior to the entry of judgment." *Vaughan v. Taft Broadcasting Co.*, 708 S.W.2d 656, 660 (Mo. banc 1986).

(3) The balance of hardships tips steeply in GM's favor. *See Sumners*, 701 S.W.2d at 724. At the time of plaintiffs' settlement demand, GM had no reason to believe it could face *both* punitive damages *and* interest on them. *See BMW*, 517 U.S. 559, 574 (1996) ("Elementary notions of fairness . . . dictate that a person receive fair

notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."). Moreover, retroactive application would not promote settlement (which would require turning back the clock) or compensate plaintiffs for lost time value of money they had no right to receive until it was awarded. Retroactive application would only work a hardship on GM and give plaintiffs a windfall.

The interest award should be reduced according to law and fundamental fairness.

CONCLUSION

The judgment should be reversed and judgment entered for GM; alternatively, the judgment should be reversed and remanded for a new trial and judgment entered for GM on punitive liability; alternatively, a new trial should be ordered; alternatively, the compensatory and punitive awards and prejudgment interest should be substantially remitted.

DATED: June 21, 2006

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By: _____

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CERTIFICATE OF SERVICE

I am over eighteen years of age, not a party in this action, and employed in Jefferson City, Missouri at 221 Bolivar Street, Jefferson City, Missouri 65101-1574. I am readily familiar with the practice of this office for collection and processing of correspondence for mail/fax/hand delivery/next business day Federal Express delivery, and they are deposited that same day in the ordinary course of business.

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The undersigned certifies that on June ___, 2006, two true copies of the foregoing brief and one disk containing the foregoing brief were mailed to the above parties by Federal Express overnight delivery.

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c) & (g)

Comes now Ann K. Covington and hereby certifies, pursuant to Rule 84.06(c) & (g) as follows:

1. That this brief includes the information required by Rule 55.03.

2. That this brief complies with the limitations contained in Rule 84.06(b).

3. That there are 28,344 words contained in this brief.

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Dated: June 21, 2004

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